Supreme Court, U.S.
FILED

(1) 98 384 SEP 1 1998

OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

OCTOBER TERM, 1997

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

NORTHERN STATES POWER COMPANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

SETH P. WAXMAN
Solicitor General
Counsel of Record
LOIS J. SCHIFFER
Assistant Attorney General
LAWRENCE G. WALLACE
Deputy Solicitor General
MALCOLM L. STEWART
Assistant to the Solicitor General
JOHN A. BRYSON
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

80 pp

QUESTION PRESENTED

In *Indiana Michigan Power Co.* v. *Department of Energy*, 88 F.3d 1272 (D.C. Cir. 1996), the court of appeals held that the Department of Energy (DOE) has an unconditional obligation to begin, on January 31, 1998, disposal of spent nuclear fuel owned by utilities that are parties to the Department of Energy's Standard Contract for Disposal of Spent Nuclear Fuel and/or High Level Radioactive Waste (Standard Contract). DOE subsequently issued a preliminary determination that the expected delay in performance by DOE of that obligation was governed by the "unavoidable delays" provision of the Standard Contract. The court of appeals then held that its prior decision in *Indiana Michigan* precluded DOE from treating the delay as "unavoidable." The question presented is:

Whether the court of appeals' order prohibiting DOE from invoking the "unavoidable delays" provision of the Standard Contract intrudes impermissibly upon the jurisdiction of the Court of Federal Claims, which has exclusive authority under the Tucker Act, 28 U.S.C. 1491 (1994 & Supp. II 1996), to adjudicate actions founded on a contract with the United States.

PARTIES TO THE PROCEEDINGS

Petitioners are the United States of America, the United States Department of Energy, and the Secretary of Energy.

Respondents are as follows: Alabama Public Service Commission, Arizona State Corporation Commission, State of Arkansas, Arkansas Public Service Commission, California Public Utilities Commission, State of Connecticut, Connecticut Department of Public Utility Control, State of Delaware, State of Florida, Florida Public Service Commission, State of Georgia, State of Indiana, State of Illinois, Illinois Commerce Commission, State of Iowa, Iowa Utilities Board, State of Kansas, Kansas Corporation Commission, Commonwealth of Kentucky, Louisiana Public Service Commission, State of Maine, State of Maryland, Maryland Public Service Commission, Commonwealth of Massachusetts, State of Michigan, Michigan Public Service Commission, State of Minnesota, Minnesota Department of Public Service, Minnesota Public Utilities Commission, State of Mississippi, Mississippi Public Service Commission, Missouri Public Service Commission, National Association of Regulatory Utility Commissioners, State of Nebraska, State of New Hampshire, New Hampshire Office of the Consumer Advocate, New Jersey Board of Public Utilities, New York State Public Service Commission, North Carolina Utilities Commission, North Dakota Public Service Commission, Public Utilities Commission of Ohio, Pennsylvania Public Utility Commission, Public Systems Group, State of Rhode Island and Providence Plantations, Public Service Commission of South Carolina, South Dakota Public Utilities Commission, State of Vermont, Vermont Public Service Board, Commonwealth of Virginia, Wiscon-

sin Public Service Commission, Northern States Power Company, Florida Power and Light Company, Duke Power Company, Vermont Yankee Nuclear Power Corporation, Niagara Mohawk Power Corporation, GPU Nuclear, Inc., Jersey Central Power & Light Company, Metropolitan Edison Company, Pennsylvania Electric Company, Wisconsin Public Service Corporation, Union Electric Company, Detroit Edison Company, Public Service Electric and Gas Company, Florida Power Corporation, Wolf Creek Nuclear Operating Corporation, Kansas Gas and Electric Company, Gas City Power & Light Company, Kansas Electric Power Cooperative, Inc., Indiana Michigan Power Company, PECO Energy Company, Virginia Electric and Power Company, Consumers Power Company, Baltimore Gas and Electric Company, Centerior Energy Corporation, Consolidated Edison Company of New York, Inc., Duquesne Light Company, Midamerican Energy Company, New York Power Authority, Pennsylvania Power & Light Company, Entergy Operations, Inc. (on its own behalf and as agent for Entergy Arkansas, Inc., System Energy Resources, Inc., South Mississippi Electric Power Association, Entergy Louisiana, Inc., Entergy Gulf States Utilities, and Cajun Electric Power Cooperative), Rochester Gas and Electric Corporation, Texas Utilities Electric Company, Carolina Power & Light Company, Pacific Gas and Electric Company, Commonwealth Edison Company, Boston Edison Company, IES Utilities, Inc., Central Iowa Power Cooperative, Corn Belt Power Cooperative, Northeast Utilities Service Company, Connecticut Yankee Atomic Power Company, North Atlantic Energy Service Corporation, American Public Power Association, Piedmont Municipal Power Agency, Connecticut Municipal Electric Energy Cooperative, Massachusetts Municipal Wholesale

Electric Company, Florida Municipal Power Agency, the New Hampshire Electric Cooperative, Inc., the Electric Department of the City of Burlington, Vermont, the Electric Department of Braintree, Massachusetts, City of Anaheim, California, City of Riverside, California, City of Banning, California, City of Azusa, California, Arizona Corporation Commission, National Associate of Regulatory Utility Commissioners, Virginia State Corporation Commission, Louisiana Public Service Commission, Illinois Power Company, Yankee Atomic Electric Company, Maine Yankee Atomic Power Company, Southern Nuclear Operating Company, Wisconsin Electric Power Company, Omaha Public Power District, Nebraska Public Power District, Southern California Edison Company, Washington Public Power Supply System, South Carolina Electric & Gas Company, Dairyland Power Cooperative.

The parties in the consolidated cases in the court of appeals were as follows:

No. 97-1064:

Petitioners: Northern States Power Company, Florida Power and Light Company, Duke Power Company, Vermont Yankee Nuclear Power Corporation, Niagara Mohawk Power Corporation, GPU Nuclear, Inc., Jersey Central Power & Light Company, Metropolitan Edison Company, Pennsylvania Electric Company, Wisconsin Public Service Corporation, Union Electric Company, Detroit Edison Company, Public Service Electric and Gas Company, Florida Power Corporation, Wolf Creek Nuclear Operating Corporation, Kansas Gas and Electric Company, Gas City Power & Light Company, Kansas Electric Power Cooperative, Inc., Indiana Michigan Power Company, PECO Energy Company, Virginia Electric and Power Company, Consumers Power Com-

pany, Baltimore Gas and Electric Company, Centerior Energy Corporation, Consolidated Edison Company of New York, Inc., Duquesne Light Company, Midamerican Energy Company, New York Power Authority, Pennsylvania Power & Light Company, Entergy Operations, Inc. (on its own behalf and as agent for Entergy Arkansas, Inc., System Energy Resources, Inc., South Mississippi Electric Power Association, Entergy Louisiana, Inc., Entergy Gulf States Utilities, and Cajun Electric Power Cooperative), Rochester Gas and Electric Corporation, Texas Utilities Electric Company, Carolina Power & Light Company, Pacific Gas and Electric Company, Commonwealth Edison Company, Boston Edison Company.

Respondents: United States Department of Energy, United States of America.

Intervenors: IES Utilities, Inc., Central Iowa Power Cooperative, Corn Belt Power Cooperative, Northeast Utilities Service Company, Connecticut Yankee Atomic Power Company, North Atlantic Energy Service Corporation, American Public Power Association, Piedmont Municipal Power Agency, Connecticut Municipal Electric Energy Cooperative, Massachusetts Municipal Wholesale Electric Company, Florida Municipal Power Agency, New Hampshire Electric Cooperative, Inc., the Electric Department of the City of Burlington, Vermont, the Electric Department of Braintree, Massachusetts, City of Anaheim, California, City of Riverside, California, City of Banning, California, City of Azusa, California, Arizona Corporation Commission, National Association of Regulatory Utility Commissioners, Virginia State Corporation Commission, Louisiana Public Service Commission.

No. 97-1065:

Petitioners: Alabama Public Service Commission, Arizona State Corporation Commission, State of Arkansas, Arkansas Public Service Commission, California Public Utilities Commission, State of Connecticut, Connecticut Department of Public Utility Control, State of Delaware, State of Florida, Florida Public Service Commission, State of Georgia, State of Indiana, State of Illinois, Illinois Commerce Commission, State of Iowa, Iowa Utilities Board, State of Kansas, Kansas Corporation Commission, Commonwealth of Kentucky, Louisiana Public Service Commission, State of Maine, State of Maryland, Maryland Public Service Commission, Commonwealth of Massachusetts, State of Michigan, Michigan Public Service Commission, State of Minnesota, Minnesota Department of Public Service, Minnesota Public Utilities Commission, State of Mississippi, Mississippi Public Service Commission, Missouri Public Service Commission, National Association of Regulatory Utility Commissioners, State of Nebraska, State of New Hampshire, New Hampshire Office of the Consumer Advocate, New Jersey Board of Public Utilities, New York State Public Service Commission, North Carolina Utilities Commission, North Dakota Public Service Commission, Public Utilities Commission of Ohio, Pennsylvania Public Utility Commission, Public Systems Group, State of Rhode Island and Providence Plantations, Public Service Commission of South Carolina, South Dakota Public Utilities Commission, State of Vermont, Vermont Public Service Board, Commonwealth of Virginia, Virginia State Corporation Commission, Wisconsin Public Service Commission.

Respondents: United States Department of Energy, Secretary of Energy, United States of America.

Intervenors: IES Utilities, Inc., Central Iowa Power Cooperative, Corn Belt Power Cooperative, Northeast Utilities Service Company, Connecticut Yankee Atomic Power Company, North Atlantic Energy Service Corporation, Public Systems Group (American Public Power Association, Piedmont Municipal Power Agency, Connecticut Municipal Electric Energy Cooperative, Massachusetts Municipal Wholesale Electric Company, Florida Municipal Power Agency, New Hampshire Electric Cooperative, Inc., Electric Department of the City of Burlington, Vermont, Electric Department of Braintree, Massachusetts, City of Anaheim, California, City of Riverside, California, City of Banning, California, City of Azusa, California).

No. 97-1370:

Petitioner: Illinois Power Company.

Respondents: United States Department of Energy, United States of America.

No. 97-1398:

Petitioner: Yankee Atomic Electric Company.

Respondent: United States Department of Energy.

No. 98-1069:

Petitioner: Maine Yankee Atomic Power Company.

Respondent: United States Department of Energy.

No. 98-1070:

Petitioners: Southern Nuclear Operating Company, Wisconsin Electric Power Company, Omaha Public Power District, Nebraska Public Power District.

Respondent: United States Department of Energy.

No. 98-1201:

Petitioner: Southern California Edison Company.

Respondent: United States Department of Energy.

No. 98-1213:

Petitioners: Washington Public Power Supply System, South Carolina Electric & Gas Company.

Respondent: United States Department of Energy.

No. 98-1284:

Petitioner: Dairyland Power Cooperative.

Respondents: United States Department of Energy, United States of America.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statutory provisions involved	2
Statement	2
Reasons for granting the petition	14
Conclusion	27
Appendix A	1a
Appendix B	15a
Appendix C	22a
Appendix D	27a
Appendix E	39a

TABLE OF AUTHORITIES

Cases:

Commonwealth Edison Co. v. *U.S. Dep't of Energy*, 877 F.2d 1042 (D.C. Cir. 1984)	23
General Elec. Uranium Mangement Corp. v. *United States Dep't of Energy*, 764 F.2d 896 (D.C. Cir. 1985)	15, 23
Indiana Michigan Power Co. v. *Dep't of Energy*, 88 F.2d 1272 (D.C. Cir. 1996)	7, 9
Megapulse, Inc. v. *Lewis*, 672 F.2d 959 (D.C. Cir. 1982)	15
Ojeda Rios, In re, 863 F.2d 202 (2d Cir. 1988)	18
Roche v. *Evaporated Milk Ass'n*, 319 U.S. 21 (1943)	18
Sharp v. *Weinberger*, 788 F.2d 1521 (D.C. Cir. 1986)	15, 16
Sindram, In re, 498 U.S. 177 (1991)	18
Telecommunications Research and Action Ctr. v. *FCC*, 750 F.2d 70 (D.C. Cir. 1984)	18
Tennessee v. *Herrington*, 806 F.2d 642 (6th Cir. 1986), cert. denied, 480 U.S. 946 (1987)	3

Cases—Continued: Page

Transohio Savings Bank v. *Director, OTS*, 967 F.2d 598 (D.C. Cir. 1992) 15, 16
Wisconsin Elec. Power Co. v. *Dep't of Energy*, 778 F.2d 1 (D.C. Cir. 1985) 15

Statutes and regulations:

Administrative Procedure Act, 5 U.S.C. 702 16
All Writs Act, 28 U.S.C. 1651(a) 18
Nuclear Waste Policy Act of 1982, 42 U.S.C. 10101 *et seq.* (1994 & Supp. II 1996) 2
§ 111(a)(4), 42 U.S.C. 10131(a)(4) 3, 4, 25, 26
§ 111(a)(5), 42 U.S.C. 10131(a)(5) 4
§ 112, 42 U.S.C. 10132 (1982) 3
§ 112(b), 42 U.S.C. 10132(b) (1982) 2
§ 113(a), 42 U.S.C. 10133(a) 3
§ 113-115, 42 U.S.C. 10133-10135 2
§ 114, 42 U.S.C. 10134 (1982) 3
§ 114, 42 U.S.C. 10134 7
§ 116, 42 U.S.C. 10136 7
§ 119, 42 U.S.C. 10139 ..... 9, 17, 18
§ 119(a), 42 U.S.C. 10139(a) 15
§ 119(a)(1), 42 U.S.C. 10139(a)(1) 9
§ 119(a)(1)(A), 42 U.S.C. 10139(a)(1)(A) 15, 18, 23
§ 119(c), 42 U.S.C. 10139(c) 9, 24, 25
§ 121, 42 U.S.C. 10141 7
§ 141, 42 U.S.C. 10161 (1982) 3
§ 142, 42 U.S.C. 10162 3
§ 145, 42 U.S.C. 10165 3
§ 145(b), 42 U.S.C. 10165(b) 8
§ 161, 42 U.S.C. 10172a 3
§ 302(a), 42 U.S.C. 10222(a) 4
§ 302(a)(1), 42 U.S.C. 10222(a)(1) 4, 13
§ 302(a)(2), 42 U.S.C. 10222(a)(2) 4, 26
§ 302(a)(3), 42 U.S.C. 10222(a)(3) 4
§ 302(a)(4), 42 U.S.C. 10222(a)(4) 4, 5, 26
§ 302(a)(5), 42 U.S.C. 10222(a)(5) 5, 24
§ 302(a)(6), 42 U.S.C. 10222(a)(6) 5, 24

Statutes and regulations:	Page
§ 302(b), 42 U.S.C. 10222(b)	4
§ 302(c), 42 U.S.C. 10222(c)	4
Act of Dec. 22, 1987, Pub. L. No. 100-302, 101 Stat. 1329	3
Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, 101 Stat. 1330	3
Tucker Act, 28 U.S.C. 1491 (1994 & Supp. II 1996)	12, 16
28 U.S.C. 1295(a)(3)	19
10 C.F.R. 961.11	*passim*
48 C.F.R. 52.249-8(c)	21
48 C.F.R. 52.249-14	21
Miscellaneous:	
48 Fed. Reg. (1983):	
p. 5458	5
p. 16,590	5
59 Fed. Reg. (1994):	
p. 27,007	8
p. 27,008	8
60 Fed. Reg. (1995):	
p. 21,793	8
pp. 21,794-21,795	8
p. 21,797	8
16 C. Wright, et al., *Federal Practice and Procedure* (1996)	18, 19

In the Supreme Court of the United States

OCTOBER TERM, 1997

No.

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

NORTHERN STATES POWER COMPANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America, the United States Department of Energy, and the Secretary of Energy, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-14a) is reported at 128 F.3d 754. The court of appeals' order denying rehearing and denying motions to enforce the mandate (App., *infra*, 15a-19a) is not reported. The court of appeals' prior opinion in *Indiana Michigan Power Co.* v. *Dep't of Energy* (App., *infra*, 27a-38a) is reported at 88 F.3d 1272.

JURISDICTION

The judgment of the court of appeals was entered on November 17, 1997. Petitions for rehearing were denied on May 5, 1998. App., *infra*, 15a-19a. On July 27, 1998, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including September 2, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant portions of Sections 119 and 302(a) of the Nuclear Waste Policy Act of 1982, as amended, 42 U.S.C. 10139 and 10222(a), are set forth at App., *infra*, 39a-40a.

STATEMENT

. 1. The Nuclear Waste Policy Act of 1982, as amended (NWPA or Act), 42 U.S.C. 10101 *et seq.* (1994 & Supp. II 1996), establishes a program for disposing of high-level radioactive waste and spent nuclear fuel (SNF). The major long-term objective of the Act is the siting, construction, and operation of a deep mined geologic repository that will safely isolate SNF from the human environment for at least 10,000 years. The Department of Energy (DOE) is charged with evaluating a site at Yucca Mountain in Nevada and, if the site is deemed suitable and is approved in accordance with the statutory procedures, obtaining a license from the Nuclear Regulatory Commission (NRC) and then constructing and operating the facility. 42 U.S.C. 10133-10135.[1]

---

[1] As originally enacted, the NWPA directed DOE to identify three potential sites for a first repository and to conduct a multi-year scientific and technical evaluation of them, a process known as site characterization. See 42 U.S.C. 10132(b) (1982). Following

In addition to providing for the development of a repository, the NWPA established the respective responsibilities of the federal government and of the owners and generators of SNF (primarily utilities that generate electricity through nuclear power). Congress determined that "while the Federal Government has the responsibility to provide for the permanent disposal of high-level radioactive waste and * * * spent nuclear fuel * * * , the costs of such disposal should be

---

site characterization, DOE was to recommend to the President one site for development as a repository; if that recommendation was approved by the President and otherwise became effective, DOE could then apply to the NRC for a license to construct and operate the repository. 42 U.S.C. 10134 (1982). The Act also authorized DOE to locate a second repository through a similar process. 42 U.S.C. 10132 (1982). In addition, the Act directed DOE to study the need for and feasibility of a monitored retrievable storage facility (MRS) for the purpose of storing SNF on an interim basis before permanent disposal in an underground repository, and to submit to Congress a site-specific proposal for such a storage facility. 42 U.S.C. 10161 (1982).

By 1986, DOE had completed the process of selecting three sites for site characterization—one in Texas, one in the State of Washington, and one at Yucca Mountain, Nevada—and had begun the process of identifying sites for a second repository. The agency had also recommended to Congress the construction of an interim storage facility at Oak Ridge, Tennessee. See *Tennessee* v. *Herrington*, 806 F.2d 642 (6th Cir. 1986), cert. denied, 480 U.S. 46 (1987). In 1987, however, Congress amended the NWPA in several significant respects. See Pub. L. No. 100-202, 101 Stat. 1329; Pub. L. No. 100-203, 101 Stat. 1330. Congress directed DOE to characterize only the Yucca Mountain site for a potential first repository, 42 U.S.C. 10133(a), and eliminated DOE's authority to identify and characterize a site for a second repository, 42 U.S.C. 10172a. The 1987 amendments also nullified the Oak Ridge interim storage facility recommendation and prohibited DOE from selecting a site for an interim storage facility until a repository site is recommended to the President. 42 U.S.C. 10162, 10165.

the responsibility of the generators and owners of such waste and spent fuel." 42 U.S.C. 10131(a)(4). Under Section 302 of the NWPA, those parties were assessed a "one-time" fee based on the amount of electricity they generated in a nuclear power reactor prior to the effective date of the NWPA, and are assessed an ongoing fee based on the amount of such power generated thereafter. 42 U.S.C. 10222(a)(2) and (3). That money is deposited into a Treasury account called the Nuclear Waste Fund, from which Congress makes annual appropriations to fund the program. 42 U.S.C. 10222(c).[2] Congress also concluded that the "generators and owners of [SNF] have the primary responsibility to provide for, and the responsibility to pay the costs of, the interim storage of such waste and spent fuel until such waste and spent fuel is accepted by the Secretary of Energy in accordance with the provisions of this chapter." 42 U.S.C. 10131(a)(5).

2. A. The NWPA provides for each generator owning spent fuel to have a contract with DOE for the disposal of the fuel. 42 U.S.C. 10222(a) and (b). The Act requires that "[s]uch contracts shall provide for payment * * * of fees [to DOE] sufficient to offset [its] expenditures." 42 U.S.C. 10222(a)(1); see also 42 U.S.C. 10222(a)(4) (fees are subject to annual adjust-

---

[2] The Department of Energy informs us that over the past 15 years, utilities have paid approximately $9 billion into the fund. Congress has appropriated, and DOE has spent, some $4.8 billion. Utilities are currently paying into the Fund at an annual rate of approximately $600 million. Once a utility ceases generating nuclear power, however, it is no longer required to pay the ongoing fee. And once the full amount due has been paid, the utility has no further financial obligation to the federal government for the disposal of its spent fuel. 42 U.S.C. 10222(a)(3).

ment in order to ensure "full cost recovery"). Section 302(a)(5) of the Act sets forth certain terms that such contracts are required to contain. That Section states:

> (5) Contracts entered into under this section shall provide that—
>
> > (A) following commencement of operation of a repository, the Secretary shall take title to the high-level radioactive waste or spent nuclear fuel involved as expeditiously as practicable upon the request of the generator or owner of such waste or spent fuel; and
> >
> > (B) in return for the payment of fees established by this section, the Secretary, beginning not later than January 31, 1998, will dispose of the high-level radioactive waste or spent nuclear fuel involved as provided in this subchapter.

42 U.S.C. 10222(a)(5). In addition to the contractual terms specifically required by the statute, DOE was directed to "establish in writing criteria setting forth the terms and conditions under which such disposal services shall be made available." 42 U.S.C. 10222(a)(6).

B. DOE established the terms of the Standard Contract for Disposal of Spent Nuclear Fuel and/or High Level Radioactive Waste (Standard Contract) by rulemaking. See 48 Fed. Reg. 5458 (1983) (proposed Standard Contract); 48 Fed. Reg. 16,590 (1983) (final Standard Contract). The Standard Contract is published at 10 C.F.R. 961.11. Each of the respondent utilities has signed an individual contract containing all the terms and conditions of the Standard Contract.

In accordance with 42 U.S.C. 10222(a)(5), Article II of the Standard Contract states that "[t]he services to

be provided by DOE under this contract shall begin, after commencement of facility operations, not later than January 31, 1998 and shall continue until such time as all SNF * * * has been disposed of." 10 C.F.R. 961.11. The Standard Contract also specifies in Articles IV.B, V, and VI criteria and procedures for scheduling DOE's receipt of spent nuclear fuel, based on the anticipated annual capacity of a disposal facility and giving priority to the oldest discharged spent fuel. See 10 C.F.R. 961.11.

Article IX of the Standard Contract addresses potential delays in contract performance. Article IX states:

A. *Unavoidable Delays by Purchaser or DOE*

> Neither the Government nor the Purchaser shall be liable under this contract for damages caused by failure to perform its obligations hereunder, if such failure arises out of causes beyond the control and without the fault or negligence of the party failing to perform. In the event circumstances beyond the reasonable control of the Purchaser or DOE—such as acts of God, or of the public enemy, acts of Government in either its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes and unusually severe weather—cause delay in scheduled delivery, acceptance or transport of [spent nuclear fuel], the party experiencing the delay will notify the other party as soon as possible after such delay is ascertained and the parties will adjust their schedules, as appropriate, to accommodate such delay.

B. *Avoidable Delays by Purchaser or DOE*

> In the event of any delay in the delivery, acceptance or transport of SNF * * * to or by DOE caused by circumstances within the reasonable control of either the Purchaser or DOE or their respective contractors or suppliers, the charges and schedules specified by this contract will be equitably adjusted to reflect any estimated additional costs incurred by the party not responsible for or contributing to the delay.

10 C.F.R. 961.11.

Article XVI of the Standard Contract establishes a mechanism for resolving "Disputes" as to contract administration. Article XVI provides for initial resolution of a dispute by DOE's designated Contracting Officer. The Contracting Officer's decision is appealable to the DOE Board of Contract Appeals. See 10 C.F.R. 961.11.

3. When the NWPA was enacted, "Congress anticipated the existence of a repository by 1998." *Indiana Michigan Power Co.* v. *Dep't Of Energy*, 88 F.3d 1272, 1277 (D.C. Cir. 1996) (App., *infra*, 37a). By 1993, however, it had become apparent both that DOE could not have a repository in operation by 1998, and that an above-ground interim storage facility could not be available by that time.[3] In response to inquiries about

---

[3] DOE currently projects that Yucca Mountain site characterization will be completed in 2001. If Yucca Mountain is found suitable for development of a repository, DOE expects to recommend approval of the site to the President in 2001. DOE further expects to be able to begin receipt of SNF at the Yucca Mountain site in 2010 if the approval is sustained (see 42 U.S.C. 10134, 10136) and if required NRC licenses are issued (see 42 U.S.C. 10134, 10141). Under the NWPA amendments of 1987, a site for an MRS cannot

DOE's plans and its view of the government's obligations under the NWPA, DOE published in the Federal Register a request for comment on a preliminary interpretation of Section 302(a)(5) of the Act. 59 Fed. Reg. 27,007 (1994). DOE's preliminary view was that the January 31, 1998, deadline specified in Section 302(a)(5) was implicitly conditioned on the availability of a repository or other licensed facility. *Ibid.*; see *id.* at 27,008.

After consideration of comments from the public, DOE concluded, in accordance with the preliminary views expressed in the earlier Federal Register notice, that the NWPA "does not impose a statutory obligation on DOE to begin nuclear waste disposal in 1998 in the absence of a disposal or interim storage facility constructed under the Act." 60 Fed. Reg. 21,793, 21,794-21,795 (1995) ("Department of Energy final interpretation of nuclear waste acceptance issues"). DOE likewise construed the Standard Contract to "predicate[] DOE's obligation [to dispose of nuclear waste] on the development of a facility under the Act." *Id.* at 21,797. DOE also stated that if the obligation to accept SNF no later than January 31, 1998, was determined to be unconditional, as the utilities contended, the Delays Clause (Art. IX, 10 C.F.R. 961.11; see pp. 6-7, *supra*) of the contract would supply the appropriate remedy. *Ibid.* DOE observed that "[w]ere the Delays Clause to be invoked, Article XVI of the Standard Contract establishes the process for resolving disputed questions of fact (e.g., whether a delay has occurred and, if so, whether it was avoidable or unavoidable)." *Ibid.*

---

be selected until a repository site is recommended to the President. See 42 U.S.C. 10165(b).

4. Pursuant to Section 119 of the NWPA, 42 U.S.C. 10139, a group of utilities, States, and state regulatory agencies filed petitions for review in the United States Court of Appeals for the District of Columbia Circuit, challenging DOE's view of its statutory and contractual obligations as reflected in the "final interpretation."[4] They asked the court to set aside DOE's interpretation; to permit the utilities to escrow their fee payments after January 31, 1998; and to order DOE to develop a plan for beginning disposal services as soon as possible after that date. The court of appeals vacated DOE's interpretation. *Indiana Michigan*, *supra* (App., *infra*, 27a-38a).

The court of appeals "agree[d] with DOE that Congress contemplated a facility would be available by 1998." App., *infra*, 37a. The court determined, however, that Congress's expectation that a repository would exist "does not mean that Congress conditioned DOE's obligation to begin acceptance of SNF on the availability of a facility." *Ibid.* The court held that the NWPA "creates an obligation in DOE, reciprocal to the utilities' obligation to pay, to start disposing of the SNF no later than January 31, 1998." *Id.* at 38a. It stated that the absence of any suitable facility for the disposal of nuclear waste "simply affects the remedy we can provide." *Id.* at 37a. The court concluded, however, that it was "premature to determine the appropriate

---

[4] Section 119 states that "the United States courts of appeals shall have original and exclusive jurisdiction over any civil action * * * for review of any final decision or action of the Secretary." 42 U.S.C. 10139(a)(1). Section 119 further provides that "[a] civil action for judicial review described under subsection (a)(1) of this section may be brought not later than the 180th day after the date of the decision or action or failure to act involved." 42 U.S.C. 10139(c).

remedy, * * * as DOE has not yet defaulted upon either its statutory or contractual obligation." *Ibid.* It therefore remanded the matter for further proceedings consistent with its opinion. *Id.* at 38a.

5. After the court of appeals issued its decision in *Indiana Michigan*, DOE issued the required notice of a delay under Article IX of the Standard Contract and gave the contract holders an opportunity to submit their views on how that delay should be addressed. App., *infra*, 5a-6a. After reviewing the comments, DOE concluded that the Disputes Clause (Art. XVI, 10 C.F.R. 961.11) of the Standard Contract governed resolution of whether the delay was "[u]navoidable" or "[a]voidable." App., *infra*, 6a. DOE also made a preliminary determination that the delay was unavoidable, and it provided 60 days for the contract holders to make submissions supporting their contrary view.[5] App., *infra*, 6a.

Many of the utilities, as well as States and state regulatory commissions, had in the meantime filed petitions for a writ of mandamus alleging that DOE had failed to comply with the court of appeals' mandate in *Indiana Michigan*. App., *infra*, 6a. Those parties renewed their request for an order requiring DOE to begin disposal services on January 31, 1998, and for a declaration that

---

[5] DOE's preliminary determination concluded that the delay was unavoidable because the unprecedented process of siting and developing a repository had been beset by technical problems, delays necessary to satisfy a broad range of regulatory requirements, legislative amendments that effectively blocked early establishment of an interim storage facility, budgetary restrictions, litigation delays, and the legal obigation to consult a broad range of interested parties, including States, Indian tribes, and private interest groups. See Exh. 6, Exhibits to Respondents' Response to Petitions for a Writ of Mandamus.

the utilities could escrow the payment of their fees if DOE failed to perform its obligation by that date. *Ibid.*

6. The court of appeals granted limited mandamus relief. *Northern States Power Co.* v. *United States Dep't of Energy*, 128 F.3d 764 (D.C. Cir. 1997) (App., *infra*, 1a-14a). The court declined to issue a writ of mandamus directing DOE to begin accepting SNF by January 31, 1998. *Id.* at 9a. It explained that such relief was unwarranted because the utilities "are presented with another potentially adequate remedy" under the Delays Clause of the Standard Contract, which "outlines how the parties are to proceed if one party is unable to fulfill its obligations in a timely manner." *Ibid.* The court therefore "conclude[d] that [the utilities] must pursue the remedies provided in the Standard Contract in the event that DOE does not perform its duty to dispose of the SNF by January 31, 1998." *Id.* at 10a.

The court of appeals determined, however, that "[a] writ of mandamus is required * * * to compel DOE to comply with [the] mandate in *Indiana Michigan*." App., *infra*, 11a. The court stated that it had "held in *Indiana Michigan* that the NWPA imposes an unconditional obligation, memorialized in the Standard Contract, to begin disposing of the [nuclear waste] materials by January 31, 1998." *Ibid.* The court concluded that "DOE's current approach toward contractual remedies"—*i.e.*, the Department's preliminary determination that the expected delay in its acceptance of SNF would be "[u]navoidable" within the meaning of Article IX—was inconsistent with the *Indiana Michigan* mandate. *Ibid.* The court of appeals "order[ed] DOE to proceed with contractual remedies in a manner consistent with NWPA's command that it undertake an unconditional obligation to begin disposal of the SNF by

January 31, 1998," and it specifically "preclude[d] DOE from concluding that its delay is unavoidable on the ground that it has not yet prepared a permanent repository or that it has no authority to provide storage in the interim." *Id.* at 13a.[6]

6. DOE filed a petition for rehearing, arguing that the court of appeals lacked jurisdiction to determine the applicability of the "unavoidable delays" provision of the Standard Contract to disputes between DOE and the utilities. App., *infra*, 18a-19a. DOE's rehearing petition explained that questions concerning the construction and administration of the Standard Contract are entrusted to the Court of Federal Claims, which exercises exclusive jurisdiction under the Tucker Act, 28 U.S.C. 1491 (1994 & Supp. II 1996), over any damage action founded on a contract with the United States. One of the utilities, Yankee Atomic Company (Yankee), also filed a rehearing petition; the remaining utilities and the States that were parties to the case filed motions to enforce or expand the mandate.[7] App., *infra*, 15a-19a.

---

[6] The court further stated: "This necessarily means, of course, that DOE not implement any interpretation of the Standard Contract that excuses its failure to perform on the grounds of 'acts of Government in either its sovereign or contractual capacity'." Pet. App. 13a (quoting Article IX.A of the Standard Contract, 10 C.F.R. 961.11). It held on that basis that "this provision in the Standard Contract, insofar as it is applied to DOE's failure to perform by 1998, is inconsistent with DOE's statutory obligation to assume an unconditional duty." *Id.* at 14a.

[7] Yankee argued that the remedy of adjustment of fees under the "[a]voidable delays" provision was inadequate as applied to Yankee because that utility had ceased nuclear power generation and was no longer paying the fee. Yankee requested the court to order DOE to begin moving Yankee's spent fuel off its site. The States and remaining utilities contended that the equitable

On May 5, 1998, the court of appeals denied the petitions for rehearing and the motions to enforce the mandate. App., *infra*, 15a-19a. In rejecting Yankee's request for a move-fuel order (*i.e.*, an order requiring DOE to accept SNF for disposal), the court explained that

> enforcement of our mandate does not extend to requiring the DOE to perform under the Standard Contract. While the statute requires the DOE to include an unconditional obligation in the Standard Contract, it does not itself require performance. Breach by the DOE does not violate a statutory duty; thus, our jurisdiction to hear allegations of failure to take an action required under the NWPA, see 42 U.S.C. § 10139(a)(1)(B), does not provide a basis for a move-fuel order.

Id. at 18a.

The court also rejected DOE's contention that the court's grant of mandamus relief impermissibly intruded on the jurisdiction of the Court of Federal Claims, stating:

> The DOE * * * suggest[s] that this Court has erroneously designated itself as the proper forum for adjudication of disputes arising under the Standard Contract. As the above should make clear, we did

---

adjustment of fees was not an appropriate remedy since under the statutory requirement of full cost recovery, DOE would be required simply to redistribute the burden of the program's costs from some utilities to other utilities. See 42 U.S.C. 10222(a)(1) (contracts shall provide for payment of fees sufficient to offset the costs of the program). They requested an order barring DOE from using fee collections to pay any costs or damages due to the delay, and renewed their request for specific relief that would order DOE to develop a plan for disposing of their spent fuel.

> not; we merely prohibited the DOE from implementing an interpretation that would place it in violation of its duty under the NWPA to assume an unconditional obligation to begin disposal by January 31, 1998. The statutory duty to include an unconditional obligation in the contract is independent of any rights under the contract. The Tucker Act does not prevent us from exercising jurisdiction over an action to enforce compliance with the NWPA.

App., *infra*, 18a-19a.

To date, only one party to the Standard Contract (the Wisconsin Electric Power Company) has filed with DOE a request for equitable adjustment of the fees under the avoidable delays provision. Eleven utilities have filed suits in the Court of Federal Claims, seeking damages ranging from $70 million to $1.5 billion. Other utilities have again sought relief in the D.C. Circuit. In addition, the States and state regulatory commissions that are parties to this case have filed a petition for a writ of certiorari from the judgment and orders below. See *State of Michigan* v. *Dep't of Energy*, No. 98-225.

REASONS FOR GRANTING THE PETITION

The court of appeals has issued a writ of mandamus prohibiting the DOE from treating its delay in accepting SNF as "[u]navoidable" within the meaning of the *force majeure* clause of the Standard Contract (10 C.F.R. 961.11) between the Department of Energy and utilities that own and generate such fuel. The court's decision intrudes upon the jurisdiction of the Court of Federal Claims—the tribunal vested with exclusive authority to adjudicate contract claims against the United States. Moreover, in dictating the appropriate resolution of an issue that is reserved for administra-

tive processes prescribed by the contract, and that is ultimately entrusted to another court, the court of appeals has pretermitted the orderly disposition of a contractual dispute that has potentially great consequences both for the liability of the United States and for the continued economic viability of nuclear generating facilities. Review by this Court is warranted both to restore the proper division of jurisdiction in contract cases between the regional courts of appeals and the Court of Federal Claims, and to prevent disruption of an important national program.

1. It is well established that "[t]he sole remedy for an alleged breach of contract by the federal government is a claim for money damages, either in the United States Claims Court under the Tucker Act, 28 U.S.C. § 1491(a)(1) (1982), or, if damages of no more than $10,000 are sought, in district court under the Little Tucker Act, 28 U.S.C. § 1346(a)(2) (1982)." *Sharp* v. *Weinberger*, 798 F.2d 1521, 1523 (D.C. Cir. 1986) (Scalia, J.). Accord, *e.g.*, *Transohio Savings Bank* v. *Director, OTS*, 967 F.2d 598, 609-610 (D.C. Cir. 1992); *Megapulse, Inc.* v. *Lewis*, 672 F.2d 959, 967 (D.C. Cir. 1982). The court of appeals' authority to review "any final decision or action of the Secretary" of Energy *under the NWPA*, 42 U.S.C. 10139(a)(1)(A), does not extend to a contracting party's claim that the Secretary has violated its rights *under the contract*.[8]

---

[8] Section 119(a), 5 U.S.C. 10139(a), is a grant of subject matter jurisdiction, and litigants invoking that provision must also identify an appropriate waiver of sovereign immunity. See *General Elec. Uranium Management Corp.* v. *U.S. Dep't of Energy*, 764 F.2d 896, 900-904 (D.C. Cir. 1985) (characterizing Section 119 as addressing subject matter jurisdiction); *Wisconsin Elec. Power Co. v. Department of Energy*, 778 F.2d 1, 2-3 (D.C. Cir. 1985) (applying *General Electric Uranium*). The only waiver of sovereign

The court of appeals purported to accept that restriction on its authority, stating (in its order on denial of rehearing) that its grant of mandamus relief in *Northern States* "does not place the question of contract remedies in this court." App., *infra*, 18a. Its decision in this case, however, cannot be reconciled with that jurisdictional limit. The court expressly "preclude[d] DOE from concluding that its delay is unavoidable on the ground that it has not yet prepared a permanent repository or that it has no authority to provide storage in the interim." App., *infra*, 13a. The words "avoidable" and "unavoidable," however, do not appear in the NWPA itself, but only in the Standard Contract. The court of appeals' determination that DOE's delay must be treated as "avoidable" thus goes directly, and exclusively, to the manner in which the Standard Contract is construed and its remedial provisions implemented. Indeed, the writ of mandamus issued by the court in *Northern States* is on its face a directive to DOE regarding the interpretation and administration of the

---

immunity potentially applicable here is that found in the Administrative Procedure Act (APA), 5 U.S.C. 702. However, parties may not obtain judicial review under the APA "if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." 5 U.S.C. 702. The Tucker Act, 28 U.S.C. 1491 (1994 & Supp. II 1996), provides a damages remedy for actions founded on a contract with the United States and impliedly forbids any other type of relief on the contract in any other court. See *Sharp*, 798 F.2d at 1523 ("The waiver of sovereign immunity in the Administrative Procedure Act does not run to actions seeking declaratory relief or specific performance in contract cases, because that waiver is by its terms inapplicable if 'any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought,' 5 U.S.C. § 702, and the Tucker Act and Little Tucker Act impliedly forbid such relief."); *Transohio*, 967 F.2d at 609.

Standard Contract. See, *e.g.*, App., *infra*, 11a ("DOE's current approach toward contractual remedies violates our directives in *Indiana Michigan*"). The court of appeals erred in resolving an issue of contract interpretation that is reserved, following administrative consideration of the claims by DOE, for the exclusive jurisdiction of the Court of Federal Claims.

2. The court of appeals concluded that mandamus relief was appropriate "because DOE has not abided by our prior conclusion that the NWPA imposes an unconditional obligation on the Department to begin disposal of the SNF by January 31, 1998." App., *infra*, 14a; see also *id.* at 19a (order on denial of rehearing) (characterizing prior opinion as "prohibit[ing] the DOE from implementing an interpretation that would place it in violation of its duty under the NWPA to assume an unconditional obligation to begin disposal by January 31, 1998."). The court thus treated the writ of mandamus as a means of "compel[ling] DOE to comply with our prior mandate in *Indiana Michigan*." *Id.* at 11a. That conclusion is flawed in two distinct respects.[9]

---

[9] The analysis that follows assumes that the court of appeals in *Indiana Michigan* properly exercised jurisdiction, pursuant to 42 U.S.C. 10139, when it held that DOE's obligation to accept SNF in January 1998 was not contingent on the existence of a suitable disposal facility. In light of the court of appeals' subsequent opinions, however, that premise is open to substantial doubt. The court in *Indiana Michigan* held that "section 302(a)(5)(B) [42 U.S.C. 10222(a)(5)(B)] creates an obligation in DOE, reciprocal to the utilities' obligation to pay, to start disposing of the SNF no later than January 31, 1998." App., *infra*, 38a. The court has since recognized, however, that its initial formulation was not accurate. In its order on denial of rehearing, the court acknowledged that "[w]hile the [NWPA] requires the DOE to include an unconditional obligation in the Standard Contract, it does not itself require performance. Breach by the DOE does not violate a statutory duty." *Id.* at

A. Except in extraordinary circumstances not applicable here, mandamus is unavailable "as a mode of review where a statutory method of appeal has been prescribed." *Roche* v. *Evaporated Milk Ass'n*, 319 U.S. 21, 27-28 (1943); see also *In re Sindram*, 498 U.S. 177, 179 (1991) (per curiam); *In re Ojeda Rios*, 863 F.2d 202 (2d Cir. 1988). Moreover, a mandamus order is appropriately issued under the All Writs Act, 28 U.S.C. 1651(a), only when the case that it affects is "one that may lie within the prospective future jurisdiction of the court of appeals, or that has in fact come within its jurisdiction in the past." 16 C. Wright et al., *Federal Practice and Procedure* § 3932, at 471 (1996); see also *id.* at 477 ("a court of appeals could not issue a writ to a district court sitting in another circuit, nor to any other tribunal properly reviewable only in another circuit"); *Ojeda Rios*, 863 F.2d at 204-205; *Telecommunications Research and Action Ctr.* v. *FCC*, 750 F.2d 70, 77-78 (D.C. Cir. 1984).

As we explain above, following administrative consideration by DOE, adjudication of claims arising under

---

18a. Because DOE's obligation to accept SNF by January 31, 1998, is contractual rather than statutory, the nature (conditional or unconditional) of that obligation is at bottom a question of contract interpretation—a matter that lies outside the jurisdiction of the court of appeals.

If the court of appeals had not previously issued its decision in *Indiana Michigan*, it is altogether clear that the Contracting Officer's preliminary determination regarding the "unavoidable" character of DOE's delay in performance would not have been subject to review under 42 U.S.C. 10139. That is so not only because the Contracting Officer's determination was one of contract construction, but also because her preliminary determination was subject to further review within the agency and therefore was not a "final decision or action of the Secretary." 42 U.S.C. 10139(a)(1)(A).

the Standard Contract is solely entrusted to the Court of Federal Claims, and thus is subject to appellate review in the Federal Circuit. See 28 U.S.C. 1295(a)(3) (Federal Circuit has exclusive jurisdiction over "an appeal from a final decision of the United States Court of Federal Claims"). There is consequently no prospect that the D.C. Circuit will be called upon to resolve any future dispute that may arise concerning the proper interpretation of the Delays Clause (Art. IX, 10 C.F.R. 961.11) of the Standard Contract. Because any suit arising under the Standard Contract will be "properly reviewable only in another circuit," Wright, *supra*, at 477, the court of appeals exceeded its authority in directing DOE not to treat the delay as "unavoidable" in implementing the contract's remedial provisions.[10]

---

[10] The government's petition for a writ of certiorari in *FCC* v. *Iowa Utilities Board, et al.*, No. 97-1519, raises a similar issue. In that case, the court of appeals for the Eighth Circuit issued a writ of mandamus declaring invalid a Federal Communications Commission (FCC) order. The Eighth Circuit acknowledged that direct review of the FCC order in question fell within the exclusive jurisdiction of the D.C. Circuit, but concluded that mandamus relief was justified as a means of enforcing its mandate entered in a prior review proceeding concerning a separate agency order. The government's petition for certiorari argues, *inter alia*, that the Eighth Circuit exceeded its authority by issuing a writ of mandamus, and that the mandamus order subverts Congress's decision to consolidate judicial review of a defined class of FCC actions in the D.C. Circuit. See 97-1519 Pet. 24-27; 97-1519 Reply Br. 7-9. The government's petition in No. 97-1519 is currently pending before this Court.

The fact that the D.C. Circuit exceeded its authority in issuing a writ of mandamus does not mean that its decision in *Indiana Michigan* would be without force in appropriate litigation under the contract in the Court of Federal Claims. In any such litigation, the utilities would be free to argue that the D.C. Circuit's decision in *Indiana Michigan* (1) is entitled to preclusive effect and (2)

B. There is, in any event, no merit to the court of appeals' conclusion that DOE's reliance on the "[u]navoidable delays" provision of Article IX is logically irreconcilable with the *Indiana Michigan* holding. Observing that treatment of the agency's delay as "unavoidable" would "let DOE off the hook for monetary damages," the court concluded that "DOE cannot now render its obligation contingent, and free itself of the costs caused by its delay." App., *infra*, 12a, 13a. The court of appeals' apparent premise was that DOE's failure to fulfill a contractual obligation *necessarily* requires the payment of damages for any losses incurred as a result of the breach—*i.e.*, that a denial of monetary relief should be regarded as the practical and legal equivalent of a determination that no contractual obligation exists.

That premise has no basis in the law of contracts and would, if pursued to its logical conclusion, render the doctrine of *force majeure* a nullity. The Standard Contract's "[u]navoidable delays" provision presupposes a "failure" by one of the contracting parties "to perform its obligations" under the contract. Art. IX.A, 10 C.F.R. 961.11. The provision is included in the Standard Contract precisely to ensure that a failure of performance will *not* give rise to monetary liability "if such

---

logically forecloses DOE from treating its delay in performance as "unavoidable" within the meaning of Article IX. It is therefore possible that the D.C. Circuit's decision in *Indiana Michigan* could ultimately affect the outcome of litigation regarding claims under the Standard Contract. The Court of Federal Claims, however, is fully capable of resolving any preclusion issues that may arise in suits falling within its jurisdiction. The D.C. Circuit's authority to enforce its mandate in *Indiana Michigan* does not extend to defining the scope of that decision's preclusive effect in suits coming within the exclusive jurisdiction of another federal court.

failure arises out of causes beyond the control and without the fault or negligence of the party failing to perform." *Ibid.*[11] Article IX.A thus reflects an unambiguous determination (and agreement) that a contracting party's failure to perform its obligations in a timely manner does not logically compel the provision of a monetary remedy.[12]

Moreover, quite apart from the court of appeals' failure to distinguish between contractual rights and remedies, the court erred in equating DOE's argument (in *Indiana Michigan*) that its obligation to accept SNF

---

[11] A *force majeure* clause excusing failures of performance caused by events beyond the control of the contracting party is a standard feature of government procurement contracts. Compare 48 C.F.R. 52.249-8(c); 48 C.F.R. 52.249-14.

[12] The court of appeals did not squarely hold that the "[u]navoidable delays" provision was contrary in its entirety to the holding in *Indiana Michigan*. The court did not, for example, expressly foreclose application of that provision to delays caused by "fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes and unusually severe weather." Art. IX.A, 10 C.F.R. 961.11. Rather, the court "preclude[d] DOE from concluding that its delay is unavoidable on the ground that it has not yet prepared a permanent repository or that it has no authority to provide storage in the interim," and it stated that "DOE [may] not implement any interpretation of the Standard Contract that excuses its failure to perform on the grounds of 'acts of Government in either its sovereign or contractual capacity.'" App., *infra*, 13a (quoting Art. IX.A, 10 C.F.R. 961.11). The court's decision to grant mandamus relief, however, was based on (1) its conclusion, drawn from the *Indiana Michigan* opinion, that DOE's obligation to accept SNF is "[u]nconditional," *id.* at 11a; and (2) its apparent belief that the existence of an "unconditional" contract obligation necessarily implies a duty to pay money damages if any breach occurs. The logic of the court's analysis would therefore appear to extend to delays caused by natural disasters or other occurrences wholly outside the control of any arm of the federal government.

was contingent on the existence of a suitable facility with its subsequent preliminary determination that its delay in performance was "unavoidable." See App., *infra*, 12a (stating that in characterizing its delay in performance as "unavoidable," "DOE is simply recycling the arguments rejected by this court in *Indiana Michigan*."). In reaching her preliminary determination that DOE's delay in accepting SNF was "unavoidable" within the meaning of Article IX, the Contracting Officer did not rely solely on the fact that no repository or other facility was available. Instead, she examined the reasons for that state of affairs. For example, she analyzed at length the many technical difficulties that had been encountered in the course of an unprecedented scientific and engineering project—a project that has as its goal the safe isolation of highly radioactive waste from the human environment "for at least 10,000 years." Resp. Exh. 6 (Contracting Officer's Preliminary Determination), *supra* note 5, at 4. She also considered the numerous regulatory hurdles that have impeded the project, the legislative actions that have constrained alternative approaches, and the effects of third-party legal challenges to and oversight of project activities. *Id.* at 6-16. Her preliminary determination regarding the proper application of the Delays Clause was based not simply on the fact that no repository or other suitable facility existed, but on her finding that the absence of such a facility was the result of factors beyond DOE's control.

For the foregoing reasons, the court of appeals lacked authority to direct DOE in its construction and implementation of the existing Standard Contract, since questions of contract interpretation are reserved for the Court of Federal Claims.

3. The court of appeals' disposition is perhaps subject to an alternative explanation—that the unavoidable delays provision is, on its face, inconsistent with the NWPA. Thus, the court stated that "DOE has no authority to adopt a contract that violates the directives of Congress"; it held that the "[u]navoidable delays" provision, "insofar as it is applied to DOE's failure to perform by 1998, is inconsistent with DOE's statutory obligation" to begin accepting SNF for disposal no later than January 31, 1998. App., *infra*, 14a; see also *id.* at 19a ("The statutory duty to include an unconditional obligation in the contract is independent of any rights under the contract. The Tucker Act does not prevent us from exercising jurisdiction over an action to enforce compliance with the NWPA.").

We agree that DOE's promulgation of the Standard Contract was a "final decision or action of the Secretary" subject to review in the court of appeals pursuant to 42 U.S.C. 10139(a)(1)(A). See, *e.g.*, *General Electric Uranium*, 764 F.2d at 900-904.[13] At the time the Standard Contract was promulgated, a utility that believed the "[u]navoidable delays" provision to be inconsistent

---

[13] In *Commonwealth Edison Co.* v. *U.S. Dep't of Energy*, 877 F.2d 1042, 1044-1045 (D.C. Cir. 1989), the court of appeals relied in part on *General Electric Uranium* in holding that it could entertain a petition for review challenging the DOE Board of Contract Appeals' interpretation of a provision of the Standard Contract. Although the government in *Commonwealth Edison* took the position that the D.C. Circuit was authorized to hear the case, we now believe that result to have been erroneous. In our view, the court in *Commonwealth Edison* failed to recognize the fundamental distinction between a challenge to the *validity* of some provision of the Standard Contract—a challenge that we agree arises under the NWPA and is properly brought in the D.C. Circuit—and a challenge to DOE's *interpretation* of existing contractual provisions.

(in whole or in part) with the NWPA's requirements could have obtained court of appeals review of that contention. The time for filing such a petition for review, however, has long since passed. The NWPA provides that a petition for review pursuant to Section 119 must be brought "not later than the 180th day after the date of the decision or action or failure to act involved." 42 U.S.C. 10139(c). The "[a]voidable delays" provision was adopted in 1983; neither the "final interpretation" issued by DOE in 1995 (see p. 8, *supra*), nor the Contracting Officer's preliminary determination that DOE's anticipated delay in contract performance should be regarded as "unavoidable" (see p. 10, *supra*), altered the text of the relevant contractual provision. The proper *interpretation* of that provision of course remains subject to adjudication in the Court of Federal Claims. But any challenge to the *terms* of the Delays Clause would have been barred by the statute of limitations at the time the petition for review in *Indiana Michigan* was filed.

4. The court of appeals' disposition of this case substantially disrupts the scheme established by Congress for resolution of disputes pertaining to the disposal of SNF. In enacting the NWPA, Congress chose not to impose upon DOE a freestanding statutory obligation to accept SNF by a particular date. Rather, Congress directed DOE to enter into contracts containing specified provisions, see 42 U.S.C. 10222(a)(5), and expressly authorized DOE to establish additional contractual terms, 42 U.S.C. 10222(a)(6). In choosing that means of achieving the statutory objectives, Congress must be presumed to have intended that disputes regarding the precise nature of the parties' obligations, and the remedies for any breach thereof, would be resolved in the manner (and in the court) appropriate for contract

claims. The court of appeals, however, has pretermitted the process of contract implementation by purporting to issue a definitive ruling as to the proper application of the Standard Contract's remedial provisions.[14]

The disposition of the utilities' contractual claims is of paramount importance both to DOE and to the utilities themselves. DOE has estimated that over the next ten years, the utilities' storage costs associated with the delay in acceptance of SNF will be between $500 million and $1 billion. The utilities, by contrast, estimate that the costs will run to the tens of billions of dollars. If the remedy specified in the "[a]voidable delays" provision is implemented as the court of appeals contemplated, DOE will be required to undertake equitable adjustments in the fees charged to individual contract holders, based on the storage costs incurred by each utility as a result of DOE's delay in performance. The likely result, paradoxically, is that DOE will be required to increase its basic fee, since the NWPA requires DOE "annually * * * to evaluate whether collection of the fee will provide sufficient revenues to offset the [program] costs" and to adjust the basic fee

---

[14] Insofar as the D.C. Circuit's ruling may rest on a determination that the terms of the Standard Contract are invalid because inconsistent with the NWPA (see pp. 23-24, *supra*), its decision disrupts the statutory scheme in a different but no less troubling way. The 180-day limitations period specified in 42 U.S.C. 10139(c) serves to ensure that both DOE and the utilities that generate SNF may assume the validity of the Secretary's actions implementing the NWPA as soon as that limitations period expires. Orderly implementation of the Standard Contract would be wholly undermined if the terms of the contract could be challenged as inconsistent with the Act more than a decade after the contract was promulgated.

so as "to [e]nsure full cost recovery" if "insufficient * * * revenues are being collected." 42 U.S.C. 10222(a)(4); see also 42 U.S.C. 10131(a)(4). Because contract holders with the lowest incremental storage costs will receive the lowest equitable adjustments, they will ultimately be forced to subsidize utilities with higher incremental costs. That remedy has the potential to make nuclear power production uneconomic, since the only way for a contract holder to end its liability to pay fees is to cease nuclear generation of electricity. See 42 U.S.C. 10222(a)(2).

In considering the propriety of the decision below, it bears noting that only one party to the instant proceedings (the Wisconsin Electric Power Company) has sought relief under the "[a]voidable delays" provision of Article IX, 10 C.F.R. 961.11, and none urged that result in the court of appeals. Instead, since the court of appeals entered its decision in this case, eleven utilities have filed breach of contract suits in the Court of Federal Claims seeking, in the aggregate, more than $4 billion in damages. The utilities have argued in those suits both that the Delays Clause is altogether inapplicable, and that the government is precluded by the D.C. Circuit's rulings from asserting *force majeure* as a defense to claims for breach of the Standard Contract.

The fact that the utility respondents themselves do not generally regard the "[a]voidable delays" provision as the proper mechanism for addressing DOE's current inability to accept SNF does not *necessarily* mean that the court of appeals' interpretation of the contract is incorrect. It does, however, reinforce the impropriety of the court's decision to issue a writ of mandamus directing DOE to administer the contract in accordance with the D.C. Circuit's reading. Review by this Court is needed to ensure that disputes regarding the imple-

mentation of the Standard Contract, in which vast sums are at stake for both the government and its contract holders, can be resolved in an orderly manner by the Court of Federal Claims—and, more broadly, to rectify the unwarranted disruptive effect of the decision below on efforts to achieve safe and equitable resolution of the difficult nationwide problem of nuclear waste disposal.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
LOIS J. SCHIFFER
Assistant Attorney General
LAWRENCE G. WALLACE
Deputy Solicitor General
MALCOLM L. STEWART
Assistant to the Solicitor General
JOHN A. BRYSON
Attorney

SEPTEMBER 1998

APPENDIX A

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

Nos. 97-1064, 97-1065, 97-1370 and 97-1398

NORTHERN STATES POWER COMPANY, ET AL.,
PETITIONERS

v.

UNITED STATES DEPARTMENT OF ENERGY
AND UNITED STATES OF AMERICA, RESPONDENTS

IES UTILITIES, INC., ET AL., INTERVENORS

[Argued: Sept. 25, 1997
Decided Nov. 14, 1997]

Before: WILLIAMS, GINSBURG and SENTELLE, Circuit Judges.

Opinion for the Court filed by Circuit Judge SENTELLE.

SENTELLE, Circuit Judge:

In *Indiana Michigan Power Co. v. Department of Energy*, 88 F.3d 1272 (D.C. Cir. 1996), we held that the Nuclear Waste Policy Act ("NWPA") imposes on the Department of Energy ("DOE") an unconditional obligation to begin disposing of high-level radioactive waste and spent nuclear fuel (collectively, "SNF") by January 31, 1998. After we issued our decision, DOE nonetheless informed various utilities and state commissions ("petitioners") that it would not accept the SNF for disposal by the 1998 deadline. Petitioners now

seek a writ of mandamus requiring DOE to comply with *Indiana Michigan* and begin disposing of the SNF by the statutory deadline. We hold that the Standard Contract between DOE and the utilities provides a potentially adequate remedy if DOE fails to fulfill its obligations by the deadline, and thus do not grant in full the writ requested by petitioners. We do agree, however, that DOE's current approach toward contractual remedies is inconsistent with the NWPA and with our prior decision in *Indiana Michigan*. We thus grant the petition in part, and issue a writ of mandamus precluding DOE from advancing any construction of the Standard Contract that would excuse its delinquency on the ground that it has not yet established a permanent repository or an interim storage program.

I. Background

In the NWPA, Congress, confronting the "national problem" posed by the accumulation of spent nuclear fuel and radioactive waste produced by various domestic sources, 42 U.S.C. § 10131(a)(2), created a scheme whereby the federal government would have the responsibility to provide for the permanent disposal of the SNF, and the costs of such disposal would be borne by the owners and generators of the waste and spent fuel. 42 U.S.C. § 10131(a)(4). The plan provided that the owners and generators of the SNF would have the primary responsibility to provide and pay for its interim storage until the Secretary of Energy accepts the material "in accordance with the provisions of this chapter." 42 U.S.C. § 10131(a)(5).

As part of this regulatory program, Congress authorized the Secretary to enter into contracts with the owners and generators for the acceptance, transportation, and ultimate disposal of the SNF. 42 U.S.C.

§ 10222(a)(1). Congress left open many of the terms of the contracts, but specifically dictated, *inter alia*, the deadline by which DOE must begin disposing of the SNF. In the language of the statute, the "[c]ontracts entered into under this section shall provide that . . . in return for the payment of fees established by this section, the Secretary, beginning not later than January 31, 1998, will dispose of the high-level radioactive waste or spent nuclear fuel involved as provided in this subchapter." 42 U.S.C. § 10222(a)(5)(B). "Payment of fees" referred to hefty contributions into a so-called Nuclear Waste Fund by owners and generators of the SNF.

In accordance with the NWPA, DOE adopted the final Standard Contract after notice and comment. The language of the Standard Contract is slightly different than that of the statute, but does include the requirement that disposal begin by January 31, 1998: "[t]he services to be provided by DOE under this contract shall begin, after commencement of facility operations, not later than January 31, 1998 and shall continue until such time as all SNF and/or HLW [high-level radioactive waste] from the civilian nuclear power reactors . . . has been disposed of." 10 C.F.R. § 961.11, Art. II (1996).

In 1993, various utilities and state agencies became concerned about DOE's ability to meet the 1998 deadline, and thus asked the Department to address how it would go about performing its responsibilities. The Department, apparently anticipating that it would not be ready to take the SNF by the deadline, took the position that it did not have a clear legal obligation to accept the SNF absent an operational repository or other facility. In its Final Interpretation of Nuclear

Waste Acceptance Issues, issued in 1995, DOE announced that it "does not have an unconditional statutory or contractual obligation to accept high level waste and spent nuclear fuel beginning January 31, 1998 in the absence of a repository or interim storage facility constructed under the [NWPA]." 60 Fed. Reg. 21,793-94. The Department also took the position that "it lacks statutory authority under the Act to provide interim storage." 60 Fed. Reg. at 21,794.

The utilities and the states promptly filed petitions for review. The question before us in *Indiana Michigan* was whether the legal obligation of DOE to accept SNF by January 31, 1998, was conditioned on the presence of an operational repository or interim storage facility. Reviewing DOE's construction of the NWPA under the two-step analysis of *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 104 S. Ct. 2778, 81 L.Ed.2d 694 (1984), we concluded that DOE's interpretation was contrary to the unambiguously expressed intent of Congress. We reached this conclusion after analyzing the plain language of the statute, which mandates that DOE assume a contractual obligation to start disposing of the SNF by January 31, 1998. We took special care to emphasize the reciprocal nature of the obligations. DOE's duty to dispose of the SNF in a timely manner is "in return for" the payment of fees into the Nuclear Waste Fund. 42 U.S.C. § 10222(a)(5)(B). We held that DOE's obligation to meet the 1998 deadline is "without qualification or condition," and identified DOE's duty to "perform its part of the contractual bargain." 88 F.3d at 1273. We therefore remanded the matter to DOE for "further proceedings consistent with" our opinion. *Id.* at 1277.

DOE neither sought rehearing of that decision nor petitioned the Supreme Court for further review.

After issuing our decision in *Indiana Michigan*, we would have expected that the Department would proceed as if it had just been told that it had an unconditional obligation to take the nuclear materials by the January 31, 1998, deadline. Not so. Quite to the contrary, the Department informed the utilities and the states that it would be unable to comply with the statutory deadline that this court had just reaffirmed. In late 1996, the utilities and the states initiated discussions with DOE and asked about the procedure and schedule that the Department would follow to comply with the court's decision. DOE responded to the utilities by announcing that it "will be unable to begin acceptance of spent nuclear fuel for disposal in a repository or interim storage facility by January 31, 1998." Utility Petitioners' Pet. at Tab 1; *see also* Tab 2. The Department recognized that the delay would affect "large number[s]" of contract holders, but nonetheless expressed "uncertainty as to when DOE will be able to begin spent fuel acceptance." *Id.* The letter ended by cordially inviting "the views of all contract holders on how the delay can best be accommodated." *Id.*

In a similar letter to the states, DOE wrote that it "understands that states are concerned about the Department's delay," and expressed an interest in talking with the states about how to mitigate the harm caused by the delay. State Petitioners' Pet., Att. D. DOE's letter also revealed one of its asserted reasons for the delay: "The Administration continues to believe that interim storage siting should not proceed until the Department has the benefit of the information resulting from the Yucca Mountain Project Viability Assess-

ment." *Id.* By the Department's own estimates, this Yucca Mountain facility will not be operational until the year 2010. Exhibits to Resp. Response, Tab 6, at 8.

On January 31, 1997, the utilities and state agencies separately petitioned for a writ of mandamus, seeking to compel DOE to comply with *Indiana Michigan* and begin disposal of the nuclear materials by January 31, 1998. Petitioners also requested that their payments to the Nuclear Waste Fund be placed in escrow unless and until DOE meets its obligations to dispose of SNF, and asked that the court prohibit DOE from taking any punitive action toward those who suspend payments to the Fund.

On June 3, 1997, DOE responded to comments submitted by contract holders regarding the anticipated delay. The Department began by recognizing that "Section 302 [of the NWPA] specifies that the contracts shall provide for the Department to begin to dispose of spent fuel not later than January 31, 1998." Exhibits to Resp. Response, Tab 6, at 4. DOE then expressed its belief that "the Standard Contract adopted by the Department pursuant to Section 302 and entered into by the contract holders specifies the available remedies in the event the Department is unable to meet the January 31, 1998 date." *Id.* Under Article IX of the contract, the Department asserted, the Department was "not obligated to provide a financial remedy for the delay," because the delay, in the Department's estimation, was "unavoidable." *Id.* at 2. After conceding that the delay may result in "hardship" to contract holders, DOE expressed its willingness "to consider amendments to individual contracts that would mitigate the impacts of the delay particular contract holders will experience in the acceptance of their spent fuel." *Id.*

II. Discussion

Petitioners assert that a writ of mandamus is necessary to force DOE to comply with *Indiana Michigan* and begin acceptance of the SNF by the 1998 deadline. Their argument rests on our prior conclusion that "section 302(a)(5)(B) [of the NWPA] creates an obligation in DOE, reciprocal to the utilities' obligation to pay, to start disposing of the SNF no later than January 31, 1998." 88 F.3d at 1277. DOE has not only failed to undertake "further proceedings consistent with" the court's opinion, petitioners argue, but has informed them of its plans to default on its obligations. Petitioners draw special attention to the fact that the Department currently accepts SNF from 41 foreign countries, from which they conclude that DOE is not unable but is simply unwilling to meet the 1998 deadline. They submit that a writ of mandamus is an appropriate remedy for the Department's refusal to comply with *Indiana Michigan* and perform its duties by the deadline set by Congress.[1]

We start our consideration of the petition with the observation that "[t]he remedy of mandamus is a drastic one, to be invoked only in extraordinary situations." *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34, 101 S. Ct. 188, 190, 66 L.Ed.2d 193 (1980). Mandamus is proper only if "(1) the plaintiff has a clear

---

[1] The state petitioners also contend that a writ of mandamus is warranted, wholly apart from our decision in *Indiana Michigan*, under *Telecommunications Research & Action Center v. F.C.C.*, 750 F.2d 70 (D.C. Cir. 1984) ("*TRAC*"). State Petitioners' Pet. at 9-12. Because we issue a writ of mandamus to effectuate our decision in *Indiana Michigan*, we decline to reach the additional question of whether issuance of the writ would have been proper under *TRAC*.

right to relief; (2) the defendant has a clear duty to act; and (3) there is no other adequate remedy available to plaintiff." *Council of and for the Blind of Delaware County Valley v. Regan*, 709 F.2d 1521, 1533 (D.C. Cir. 1983) (en banc). The party seeking mandamus has the burden of showing that "its right to issuance of the writ is clear and indisputable." *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 289, 108 S. Ct. 1133, 1143, 99 L.Ed.2d 296 (1988) (internal quotations and citations omitted).

Petitioners have established that they have a clear right to relief, and thus have satisfied the first requirement for a writ of mandamus. As we explained in *Indiana Michigan*, the NWPA requires DOE, "in return for the payment of fees," to begin disposing of the materials "not later than January 31, 1998." 42 U.S.C. § 10222(a)(5)(B). We specifically noted that the payment of fees into the Nuclear Waste Fund is the "only limitation placed on the Secretary's duties" found in the text of the statute. 88 F.3d at 1276. The owners and generators have dutifully complied with the NWPA, pouring billions of dollars of payments into the Fund with the expectation that DOE would live up to its end of the bargain. The Department, on the other hand, has tersely informed the parties that it "will be unable to begin acceptance of spent nuclear fuel for disposal in a repository or interim storage facility by January 31, 1998." Utility Petitioners' Pet. at Tab 1. Petitioners' full compliance with the requirements of the NWPA, taken in conjunction with DOE's refusal to perform its reciprocal duties, compels the conclusion that petitioners have established a clear right to relief in this case.

The second requirement is also satisfied. DOE's duty to act could hardly be more clear. DOE argued in *Indiana Michigan* that its obligations under the NWPA were contingent on the existence of a repository or interim storage facility. We held that DOE's interpretation was inconsistent with the text of the NWPA, which clearly demonstrates a congressional intent that the Department assume a contractual obligation to perform by the 1998 deadline, "without qualification or condition." 88 F.3d at 1276. DOE's duty to take the materials by the 1998 deadline is also an integral part of the Standard Contract, which provides that the Department "shall begin" disposing of the SNF by January 31, 1998. 10 C.F.R. § 961.11, Art. II. The contractual obligations created consistently with the statutory contemplation leave no room for DOE to argue that it does not have a clear duty to take the SNF from the owners and generators by the deadline imposed by Congress.

Although petitioners have a clear right to relief, and the Department has a clear duty to act, we decline to issue the broad writ of mandamus sought by petitioners because they are presented with another potentially adequate remedy. Although the statute does not prescribe a particular remedy in the event that the Department fails to perform on time, the Standard Contract does provide a scheme for dealing with delayed performance. 10 C.F.R. § 961.11, Art. IX. Specifically, Article IX of the Standard Contract outlines how the parties are to proceed if one party is unable to fulfill its obligations in a timely manner. Under Article IX, unavoidable delays are to be treated differently than avoidable delays. A failure to perform is considered "unavoidable" only if such failure "arises

out of causes beyond the control and without the fault or negligence of the party failing to perform." *Id.* at Art. IX.A. If a party's delay is determined to be unavoidable, that party is not liable for damages caused by the failure to perform in a timely manner. *Id.* An avoidable delay, in contrast, is caused by "circumstances within the reasonable control" of the delinquent party. *Id.* at Art. IX. B. If a party's delay is avoidable, the charges and schedules in the contract must be equitably adjusted to reflect additional costs incurred by the other party. *Id.* The contract also provides a mechanism for resolving disputes of fact that the parties may encounter along the way. *See id.* at Art. XVI.

Petitioners have not convinced us that this contractual scheme is inadequate to deal with DOE's anticipated delay in accepting the SNF. Petitioners have suggested that the contractual processes are inadequate, claiming that they will "suffer additional billions of dollars in additional costs if DOE fails to meet its January 1998 obligation," Utility Petitioners' Pet. at 4, and that they will not be able to recover these costs in the contract proceedings because the Department is excusing its own default. *See* Utility Petitioners' Reply at 2. Such costs may in fact ensue if DOE fails to perform on time, but there is no reason to believe that these additional expenses will not be taken into account if the contractual processes operate as Congress intended. *See infra* at 11-13. Accordingly, we conclude that petitioners must pursue the remedies provided in the Standard Contract in the event that DOE does not perform its duty to dispose of the SNF by January 31, 1998. This conclusion, we should note, comports with our decision in *Indiana Michigan.* Even though we did

not enter a remedy at that time, we suggested that the provisions of the Standard Contract would determine the appropriate remedy for the Department's failure to perform its obligations. 88 F.3d at 1277.

A writ of mandamus is required, however, to compel DOE to comply with our prior mandate in *Indiana Michigan*. *See Office of Consumers' Counsel v. FERC*, 826 F.2d 1136, 1140 ("A federal appellate court has the authority, through the process of mandamus, to correct any misconception of its mandate by a lower court or administrative agency subject to its authority."); *see also Potomac Electric Power Co. v. Interstate Commerce Comm.*, 702 F.2d 1026, 1032 (D.C. Cir. 1983). We held in *Indiana Michigan* that the NWPA imposes an unconditional obligation, memorialized in the Standard Contract, to begin disposing of the materials by January 31, 1998. We rejected the Department's attempt to water-down its obligations, finding that DOE's interpretation would "destroy[ ] the *quid pro quo* created by Congress" and would mean that the payment of fees into the Nuclear Waste Fund "was for nothing." 88 F.3d at 1276. To effectuate DOE's duty, as we recognized in *Indiana Michigan*, petitioners must be able to enforce the terms of the contract in a meaningful way. Petitioners' ability to enforce the contract would be frustrated if DOE were allowed to operate under a construction of the contract inconsistent with our prior conclusion that the NWPA imposes an obligation on DOE "without qualification or condition." *Id.*

Viewed in this light, DOE's current approach toward contractual remedies violates our directives in *Indiana Michigan*. As explained above, the Department has endeavored to proceed according to Article IX of the Standard Contract, by first informing the parties of its

anticipated delay, and then evaluating whether its own delay is "unavoidable." Article IX describes an unavoidable delay as a party's " failure to perform its obligations . . . aris[ing] out of causes beyond the control and without the fault or negligence of the party failing to perform." 10 C.F.R. § 961.11, Art. IX.A. The contract goes on to list a few examples of circumstances "beyond the reasonable control" of the delayed party: "acts of God, or of the public enemy, acts of Government in either its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes and unusually severe weather." *Id.* The Contracting Officer isolated six factors that, taken together, supposedly support the conclusion that DOE experienced an unavoidable delay in this case: technical problems; regulatory delays; roadblocks to implementation of interim or monitored retrievable storage; funding restrictions; litigation delays; and consultation requirements. Exhibits to Resp. Response, Tab 6. Reaching the preliminary conclusion that the delay was unavoidable, the Department's Contracting Officer let DOE off the hook for monetary damages.

The most glaring problem with DOE's position is that it is answering the wrong question: it is attempting to explain why it will not have a "state-of- the-art, deep geologic facility for the permanent disposal of the Nation's spent nuclear fuel and high- level waste" ready by 1998. *Id.* Put another way, DOE's position is that its delayed performance is unavoidable because it does not have an operational repository, and does not have the authority to provide storage in the interim. DOE is simply recycling the arguments rejected by this court in *Indiana Michigan.* DOE unsuccessfully argued in that case that it does not have an obligation to take the

SNF in the absence of an operational repository or other facility; here, DOE recycles that same argument in the slightly different form that it does not have responsibility for the costs resulting from its failure to perform that duty because it does not have an operational repository or other facility. As we pointed out in *Indiana Michigan*, the NWPA directs DOE to undertake the duty to begin taking the SNF by January 31, 1998, whether or not it has a repository or interim storage facility. DOE cannot now render its obligation contingent, and free itself of the costs caused by its delay, by advancing the same failed position that we rejected before.

Given DOE's repeated attempts to excuse its delay on the ground that it lacks an operational repository or interim storage facility, we find it appropriate to issue a writ of mandamus to correct the Department's misapprehension of our prior ruling. Accordingly, we order DOE to proceed with contractual remedies in a manner consistent with NWPA's command that it undertake an unconditional obligation to begin disposal of the SNF by January 31, 1998. More specifically, we preclude DOE from concluding that its delay is unavoidable on the ground that it has not yet prepared a permanent repository or that it has no authority to provide storage in the interim.

This necessarily means, of course, that DOE not implement any interpretation of the Standard Contract that excuses its failure to perform on the grounds of "acts of Government in either its sovereign or contractual capacity." 10 C.F.R. § 961.11, Art. IX.A. We held in *Indiana Michigan* that the NWPA imposes an unconditional duty on DOE to take the materials by 1998. Congress, in other words, directed DOE to

assume an unqualified obligation to take the materials by the statutory deadline. Under the Department's interpretation of the governing contractual provisions, however, the government can always absolve itself from bearing the costs of its delay if the delay is caused by the government's own acts. This cannot be a valid interpretation, as it would allow the Executive Branch to void an unequivocal obligation imposed by Congress. DOE has no authority to adopt a contract that violates the directives of Congress, just as it cannot implement interpretations of the contract that contravene this court's prior ruling. We hold that this provision in the Standard Contract, insofar as it is applied to DOE's failure to perform by 1998, is inconsistent with DOE's statutory obligation to assume an unconditional duty.

III. Conclusion

In conclusion, we do not grant petitioners' broad request for a writ of mandamus because we conclude that the remedial scheme of the Standard Contract offers a potentially adequate remedy. We do, however, grant the petition in part because DOE has not abided by our prior conclusion that the NWPA imposes an unconditional obligation on the Department to begin disposal of the SNF by January 31, 1998. We therefore issue a writ of mandamus precluding DOE from excusing its own delay on the grounds that it has not yet prepared a permanent repository or interim storage facility. We retain jurisdiction over this case pending compliance with the mandate issued herewith.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1997

No. 97-1064

NORTHERN STATES POWER COMPANY, ET AL.,
PETITIONERS

v.

UNITED STATES DEPARTMENT OF ENERGY
AND UNITED STATES OF AMERICA, RESPONDENTS

IES UTILITIES, INC., ET AL., INTERVENORS

Consolidated with Nos. 97-1065, 97-1370 and 97-1398

No. 98-1069

IN RE: MAINE YANKEE ATOMIC POWER CO.,
PETITIONER

No. 98-1070

IN RE: SOUTHERN NUCLEAR OPERATING CO., ET AL.,
PETITIONERS

[Filed: May 5, 1998]

ORDER

Before: WILLIAMS, GINSBURG and SENTELLE, *Circuit Judges.*

Upon consideration of the Motions to Consolidate from Maine Yankee and Southern Nuclear; the Motions

from the Department of Energy to Dismiss the suits of Maine Yankee and Southern Nuclear; the Motions for Enforcement of the Mandate from the State Petitioners, the Utility Petioners [*sic*], and Connecticut Yankee; and the Petitions for Rehearing from Yankee Atomic and the Department of Energy, and the responses thereto and the replies, it is hereby

ORDERED that the Motions to Consolidate are granted. The Petitions and Motions are otherwise denied.

I. Maine Yankee and Southern Nuclear Operating Company are parties to the Department of Energy's ("DOE") Standard Contract for Disposal of Spent Nuclear Fuel ("SNF"). Their suits against the DOE present issues identical to those raised by the Utility Petitioners in *Northern States Power Co. v. DOE*, 128 F.3d 754 (D.C. Cir. 1997). To make clear that they are entitled to identical relief, we grant the motion to consolidate. Our disposition of the motions for enforcement and petitions for rehearing, discussed below, applies in full measure to Maine Yankee and Southern Nuclear.

II. The DOE moves for dismissal of the actions of Maine Yankee and Southern Nuclear. Those utilities are entitled to the same relief as the other Utility Petitioners; consequently, we do not dismiss their suits but instead consolidate them with *Northern States*. The relief awarded in that decision extends to them. To the extent that they join in the Utility Petitioners' motions, the following dispositions also apply to them. The DOE's motion is denied.

III. The State Petitioners request an order that (1) bars the DOE from using utility and ratepayer-

supplied monies from the Nuclear Waste Fund ("NWF") or fee collections to pay any costs or damages awarded to utilities under the Standard Contract; (2) authorizes the payment of NWF fees into an interest-bearing escrow account; and (3) requires the DOE to file a plan for disposing of SNF before receiving any more shipments of foreign or domestic SNF at its existing facilities.

We express no opinion on the legality of the DOE's using utility or ratepayer-supplied monies to pay costs or damages, nor on the adequacy of any particular type of equitable adjustment of fees that might be awarded to utilities under the Delays Clause of the Standard Contract. Our decision in *Northern States* barred the DOE from interpreting the Contract as imposing only a contingent disposal obligation; such an interpretation, we ruled, would place the DOE in violation of its statutory duties under the Nuclear Waste Policy Act ("NWPA"), which required it to undertake an unconditional obligation. Beyond that clarification of the statute's requirements, we remitted the utilities to their remedies under the Standard Contract. Suits based on the Contract may present issues of the permissible forms of equitable adjustment, and possibly the award of some forms of equitable adjustment would place the DOE in violation of the NWPA and again properly trigger our jurisdiction (as opposed to that of the Court of Federal Claims) under either the NWPA or the APA. But as the DOE has not yet taken any of these actions, the issues are not ripe for review as presented to us in these petitions.

The second and third elements of the State Petitioners' requested order constitute equitable contract remedies against the DOE and fall outside the scope of

the *Northern States* mandate. *Northern States* describes the nature of the DOE's obligation, which was created by the NWPA and undertaken by the DOE under the Standard Contract. It does not place the question of contract remedies in this court, nor set up this court as a source of remedies outside the Standard Contract.

IV. The Utility Petitioners request essentially the same relief as the State Petitioners. For the same reasons, their request is denied.

V. Yankee Atomic requests an order requiring the DOE to begin to dispose of its SNF, asserting that monetary damages are inadequate. We do not address the question of the adequacy of damages or of any contract remedy. The order cannot issue because enforcement of our mandate does not extend to requiring the DOE to perform under the Standard Contract. While the statute requires the DOE to include an unconditional obligation in the Standard Contract, it does not itself require performance. Breach by the DOE does not violate a statutory duty; thus, our jurisdiction to hear allegations of failure to take an action required under the NWPA, see 42 U.S.C. § 10139(a)(1)(B), does not provide a basis for a move-fuel order.

VI. Connecticut Yankee requests an order prohibiting the DOE from using NWF monies to compensate utilities for delay, and requiring the DOE to move Connecticut Yankee's spent fuel. This request is covered by the discussion above: the issue of recycling NWF monies is not ripe, and the move-fuel order is beyond our mandate.

VII. The DOE petitions for rehearing, suggesting that this Court has erroneously designated itself as the

proper forum for adjudication of disputes arising under the Standard Contract. As the above should make clear, we did not; we merely prohibited the DOE from implementing an interpretation that would place it in violation of its duty under the NWPA to assume an unconditional obligation to begin disposal by January 31, 1998. The statutory duty to include an unconditional obligation in the contract is independent of any rights under the contract. The Tucker Act does not prevent us from exercising jurisdiction over an action to enforce compliance with the NWPA. The DOE's petition is denied.

FOR THE COURT:

Mark J. Langer, Clerk

BY: /s/ MICHAEL C. MCGRAIL
MICHAEL C. MCGRAIL
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1997

No. 97-1064

NORTHERN STATES POWER COMPANY (MINNESOTA), ET AL., PETITIONERS

v.

DEPARTMENT OF ENERGY AND UNITED STATES OF AMERICA, RESPONDENTS

IES UTILITIES, INC., ET AL., INTERVENORS

Consolidated with Nos. 97-1065, 97-1370, 97-1398

[Filed: May 5, 1998]

Before: EDWARDS, Chief Judge; WALD, SILBERMAN, WILLIAMS, GINSBURG, SENTELLE, HENDERSON, RANDOLPH, ROGERS, TATEL and GARLAND, Circuit Judges.

ORDER

Upon consideration of respondents' Suggestion for Rehearing *In Banc*, and the absence of a request by any member of the court for a vote, it is

ORDERED that the suggestion be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ ROBERT A. BONNER
ROBERT A. BONNER
Deputy Clerk

Circuit Judges Silberman and Garland did not participate in this matter.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
SEPTEMBER TERM, 1997

No. 97-1064

NORTHERN STATES POWER COMPANY (MINNESOTA), ET AL., PETITIONERS

v.

DEPARTMENT OF ENERGY AND UNITED STATES OF AMERICA, RESPONDENTS

IES UTILITIES, INC., ET AL., INTERVENORS

Consolidated with Nos. 97-1065, 97-1370, 97-1398, 98-1069, 98-1070

No. 98-1201

SOUTHERN CALIFORNIA EDISON COMPANY, PETITIONER

v.

DEPARTMENT OF ENERGY, RESPONDENT

No. 97-1213

WASHINGTON PUBLIC POWER SUPPLY SYSTEM AND SOUTH CAROLINA ELECTRIC & GAS COMPANY, PETITIONERS

v.

DEPARTMENT OF ENERGY, RESPONDENT

[Filed: July 2, 1998]

ORDER

Before: WILLIAMS, GINSBURG, AND SENTELLE, Circuit Judges.

Upon consideration of the petitions for review and for a writ of mandamus, the motion to consolidate, the motion to dismiss, the joint motion to withdraw, and the stipulation regarding the response to the petition for review in 98-1213, it is

ORDERED that the motions to consolidate be granted. It is

FURTHER ORDERED that the petitions be denied. Because the holding of *Northern States v. Department of Energy*, 128 F.3d 754 (D.C. Cir. 1997), bars the Department of Energy from utilizing its previous interpretation of the Nuclear Waste Policy Act in dealings with any entity, and because Standard Contract holders must seek remedies available under the contract in other fora, these cases and No. 97-1067 are concluded and no further relief can be sought therein. *See Northern States v. Department of Energy*, No. 97-1064 (D.C. Cir. May 5, 1998) (order explaining reasons for refusal to grant relief on post-judgment petitions for review and for mandamus).

The Clerk is directed to withhold issuance of the mandate herein until seven days after the disposition of any timely petition for rehearing. *See* D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ MICHAEL C. MCGRAIL
MICHAEL C. MCGRAIL
Deputy Clerk/LD

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
SEPTEMBER TERM, 1997

No. 97-1064

NORTHERN STATES POWER COMPANY (MINNESOTA), ET AL., PETITIONERS

v.

DEPARTMENT OF ENERGY AND UNITED STATES OF AMERICA, RESPONDENTS

IES UTILITIES, INC., ET AL., INTERVENORS

Consolidated with Nos. 97-1065, 97-1370, 97-1398, 98-1069, 98-1070

No. 98-1284

DAIRYLAND POWER COOPERATIVE, PETITIONER

v.

DEPARTMENT OF ENERGY AND UNITED STATES OF AMERICA, RESPONDENTS

[Filed: July 2, 1998]

ORDER

Before: WILLIAMS, GINSBURG, AND SENTELLE, Circuit Judges.

Upon consideration of the petition for review and the motion for consolidation with No. 97-1064, it is

ORDERED that the petition be denied, for the reasons stated in the court's order filed May 5, 1998, in

Northern States v. Department of Energy, No. 97-1064. It is

FURTHER ORDERED that the motion to consolidate be dismissed as moot.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ MICHAEL C. MCGRAIL
MICHAEL C. MCGRAIL
Deputy Clerk/LD

APPENDIX D

UNITED STATES COURT OF APPEALS,
DISTRICT OF COLUMBIA CIRCUIT

Nos. 95-1279, 95-1321 AND 95-1463

INDIANA MICHIGAN POWER COMPANY, ET AL.,
PETITIONERS

v.

DEPARTMENT OF ENERGY AND UNITED STATES OF AMERICA, RESPONDENTS, NORTHERN STATES POWER COMPANY (MINNESOTA), ET AL., INTERVENORS

[Argued: Jan. 17, 1996
Decided: July 23, 1996]

Before: WILLIAMS, GINSBURG, AND SENTELLE, Circuit Judges.

Opinion for the Court filed by Circuit Judge SENTELLE.

SENTELLE, Circuit Judge:

The Nuclear Waste Policy Act ("NWPA") of 1982 authorized the Secretary of Energy ("Secretary") to enter contracts with owners and generators of high-level radioactive waste and spent nuclear fuel ("SNF") under which the private parties were to pay the Secretary statutorily imposed fees in return for which the Secretary, "beginning not later than January 31, 1998, will dispose of the high-level radioactive waste or [SNF] involved." 42 U.S.C. § 10222(a)(5)(B) (1994). Petitioners are utilities and state commissions who paid

fees to the Secretary under the statute. They seek review of the Department of Energy's ("DOE") final interpretation declaring that the Department has no obligation to perform its part of the contractual bargain. We conclude that the Department's interpretation is not valid and we therefore allow the petition for review.

Background

In the NWPA, Congress created a comprehensive scheme for the interim storage and permanent disposal of high-level radioactive waste generated by civilian nuclear power plants. NWPA establishes that, in return for a payment of fees by the utilities, DOE will construct repositories for SNF, with the utilities generating the waste bearing the primary responsibility for interim storage of SNF until DOE accepts the SNF "in accordance with the provisions of this chapter." 42 U.S.C. § 10131(a)(5).

The NWPA requires the utilities to enter into standard contracts with DOE for the disposal of the waste. According to the statute, the contracts shall provide that:

> (A) following commencement of operation of a repository, the Secretary shall take title to the high-level radioactive waste or spent nuclear fuel as expeditiously as practicable upon the request of the generator or owner of such waste or spent fuel; and
>
> (B) in return for the payment of fees established by this section, the Secretary, beginning not later than January 31, 1998, will dispose of the high-level radioactive waste or spent nuclear fuel as provided in this subchapter.

42 U.S.C. § 10222(a)(5). The final standard contract adopted by DOE, following notice and comment, states that "[t]he services to be provided by DOE under this contract shall begin, after commencement of facility operations, not later than January 31, 1998 and shall continue until such time as all SNF . . . from the civilian nuclear power reactors specified . . . has been disposed of." 10 C.F.R. § 961.11, Art. II (1996).

In 1993, several states and utilities became concerned about DOE's ability to meet its obligations under the NWPA. Therefore, they requested DOE to address its responsibilities under the NWPA, particularly section 302(a)(5), 42 U.S.C. § 10222(a)(5), and the January 31, 1998 deadline. Daniel Dreyfuss, Director of DOE's Office of Civilian Radioactive Waste Management, responded in a letter that DOE "does not have a clear legal obligation under the [NWPA] to accept [SNF] absent an operational repository or other facility." In February 1994, DOE's Secretary, Hazel O'Leary, indicated that, while at the time NWPA was enacted DOE "envisioned that it would have a waste management facility in operation and prepared to begin acceptance of [SNF] in 1998," DOE subsequently concluded it did not have "a clear legal obligation under the [NWPA] to accept [SNF] absent an operational repository or other facility constructed under the [NWPA]."

To address this issue, on May 25, 1994, DOE published a Notice of Inquiry on Waste Acceptance Issues ("NOI"), requesting the views of affected parties on matters relating to the continued storage of SNF at reactor sites beyond 1998. 59 Fed. Reg. 27,007 (1994). DOE presented its preliminary finding that it had "no statutory obligation to accept [SNF] beginning in 1998

in the absence of an operational repository or other facility constructed under the [NWPA]." *Id.* at 27,008. DOE did note, however, that the terms of the Standard Contract may have created such an expectation. *Id.*

On June 20, 1994, utility petitioners ("utilities") and state petitioners ("states") filed petitions for review against DOE. This Court dismissed the petitions, finding that the NOI did not constitute final agency action. *Northern States Power Co. v. DOE*, Nos. 94-1457, 94-1458, 94-1574, 1995 WL 479714 (D.C. Cir. July 28, 1995) (order granting motion to dismiss case).

On April 28, 1995, DOE issued its Final Interpretation. *Final Interpretation of Nuclear Waste Acceptance Issues*, 60 Fed. Reg. 21,793 (1995). In the Final Interpretation, DOE stated that it would not be able to begin taking SNF by January 31, 1998, the date established by the NWPA. *Id.* at 21,793-94. DOE concluded that it did not have an unconditional statutory or contractual obligation to accept high-level waste and spent fuel beginning January 31, 1998 in the absence of a repository or interim storage facility constructed under the NWPA. *Id.* The agency also determined that it had no authority under the NWPA to provide interim storage in the absence of a facility that has been authorized, constructed and licensed in accordance with the NWPA. *Id.* at 21,797. Finally, DOE declared that, even if it did have an unconditional obligation under the statute, the Delays Clause of the Standard Contract would provide an administrative remedy for DOE's failure to satisfy an obligation under the statute. *Id.*

Petitioners and intervenors then filed their petitions for review of the Final Interpretation.

Analysis

In reviewing an agency's construction of a statute entrusted to its administration, we follow the two-step statutory analysis established in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43, 104 S. Ct. 2778, 81 L.Ed.2d 694 (1984). First, we ask whether Congress has spoken unambiguously to the question at hand. If it has, then our duty is clear: "We must follow that language and give it effect." *Wisconsin Elec. Power Co. v. DOE*, 778 F.2d 1, 4 (D.C.Cir.1985). If not, we consider the agency's action under the second step of Chevron, deferring to the agency's interpretation if it is "reasonable and consistent with the statute's purpose." *Nuclear Info. Resource Serv. v. NRC*, 969 F.2d 1169, 1173 (D.C. Cir. 1992) (quoting *Chemical Mfrs. Ass'n v. EPA*, 919 F.2d 158, 162-63 (D.C. Cir. 1990)). We now apply that review to the Department's interpretation of section 302(a)(5)(B).

Section 302(a)(5)(B) states that "in return for the payment of fees . . . [DOE], beginning not later than January 31, 1998, will dispose of the [SNF]. . . ." The states and utilities contend that this provision means what it says: in return for the payment of fees to the utilities, DOE will begin accepting SNF not later than January 31, 1998. DOE argues that this language does not in fact require it to begin to dispose of SNF by January 31, 1998; rather, the agency contends that this obligation is further conditioned on the availability of a repository or other facility authorized, constructed, and licensed in accordance with the NWPA. DOE contends that this is the only interpretation possible when one examines the statute as a whole.

To support this interpretation, the Department first argues that Congress's use of the term "dispose" in section 302(a)(5)(B), which provides that DOE "will dispose of the high-level radioactive waste or spent nuclear fuel involved as provided in this subchapter," presupposes the availability of a repository. Although conceding that the statute does not define "dispose," DOE notes that the statute does define "disposal" as "the emplacement in a repository of . . . spent nuclear fuel . . . with no foreseeable intent of recovery." 42 U.S.C. § 10101(9). DOE contends that "dispose" is simply a different grammatical form of "disposal," and that Congress must have intended the two terms be interpreted consistently. Thus, it argues, section 302 must require a repository be operational before DOE may begin accepting SNF.

We disagree. The phrase "dispose of " is a common term. It has a common meaning. For example, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY UNABRIDGED 654 (1961) defines it as meaning, among other things, "to get rid of; throw away; discard." Admittedly, that and other dictionaries list other definitions. Each of those definitions, however, is consistent with the one set forth and not consistent with a limitation for placing the object of the phrase "in the disposal." There is no indication in the statute that Congress intended the words to be used in any but their common sense. *See McNally v. United States*, 483 U.S. 350, 358-59, 107 S. Ct. 2875, 2880-81, 97 L.Ed.2d 292 (1987) (interpreting commonly used phrase according to "common understanding" where Congress had "not indicat[ed]" an intent to depart from it). Indeed, the very fact that Congress defined "disposal" restrictively and did not define "dispose" bears mute testi-

mony to the strong possibility that Congress intended the former as a term of art, the latter as common English. Indeed, DOE itself has previously concluded that the statutory definition of "disposal" was not intended to define "dispose of." In an April 1, 1987 letter, DOE's general counsel, although responding to a different issue, wrote "we doubt that the[se] terms were intended to have identical meanings." Furthermore, if DOE's obligation to dispose of waste was linked exclusively to the Act's definition of "disposal" then that obligation would be conditioned only upon the availability of a *repository*. However, Article II of the Standard Contract provides that DOE will provide its services after commencement of "facility" operations, 10 C.F.R. 961.11, with "facility" being defined as including both a repository and "such other facilit[ies] to which spent nuclear fuel and/or high-level radioactive waste may be shipped by DOE prior to its transportation to a disposal facility." *Id.* at Article I. It is difficult to see how that paragraph and the Department's interpretation of the statutory section can sensibly coexist.

Perhaps more importantly, we must interpret the section in light of the whole statutory scheme. *See Bailey v. United States*, —— U.S. ——, ——, 116 S. Ct. 501, 506, 133 L.Ed.2d 472 (1995) (observing that a court must "consider not only the bare meaning of the word but also its placement and purpose in the statutory scheme.") In the scheme before us, indeed in another subsection of the very section under review, Congress used even the elsewhere narrowly defined "disposal" to encompass more than "emplacement in a repository of . . . spent nuclear fuel . . . with no foreseeable intent of recovery." That is, in section 302(d), 42 U.S.C.

§ 10222(d), Congress authorizes the Secretary to make expenditures "for purposes of radioactive waste disposal activities," and expressly includes within the ambit of authorized "disposal" activities those conducted not only in connection with repositories, but also with "any . . . monitored retrievable storage facility or test and evaluation facility constructed under this chapter." 42 U.S.C. § 10222(d)(1). Therefore, even if we look to Congress's use of "disposal" to enlighten our interpretation of "dispose of," we still find that Congress has not evidenced limited usage for which the Department argues.

DOE next argues that subsections (A) and (B) of 302(a)(5) are not independent provisions, but rather must be read together because taking title to the waste cannot be separated from the disposal activities. To support this proposition, DOE cites section 302(a)(1), which describes the Standard Contract as "for the acceptance of title, subsequent transportation, and disposal of such waste or spent fuel" and section 123, which provides that "[d]elivery and acceptance by the Secretary, of any high-level radioactive waste or spent nuclear fuel for a repository constructed under this part shall constitute a transfer to the Secretary of title to such waste and spent fuel." 42 U.S.C. § 10143. Respondent contends that these provisions evince Congress's intent that DOE take title to the waste before proceeding with disposal. According to DOE, any other interpretation of these sections would result in an anomaly in which one party would have ownership of the SNF while another party would have physical control of it.

We do not find this argument persuasive. Sections 302(a)(5)(A) and (B) clearly set forth two independent

requirements. These separate obligations are independent of whether DOE holds title to SNF when it begins to dispose of the material. The duties imposed on DOE under subsections (A) and (B) are linked to different events and are triggered at different times. DOE's duty under subsection (A) to take title to the SNF is linked to the commencement of repository operations and is triggered when a generator or owner of SNF makes a request to DOE. DOE's duty under subsection (B) to dispose of the SNF is conditioned on the payment of fees by the owner and is triggered, at the latest, by the arrival of January 31, 1998. Nowhere, however, does the statute indicate that the obligation established in subsection (B) is somehow tied to the commencement of repository operations referred to in subsection (A).

This conclusion is reinforced by the placement of the two requirements in the Standard Contract. DOE's obligation *to dispose* of SNF under section 302(a)(5)(B) is set forth in Article II-Scope, 10 C.F.R. § 961.11, whereas DOE's obligation to take title to SNF under section 302(a)(5)(A) is set forth in Article VII-Title. *Id.* In addition, contrary to DOE's assertions, it is not illogical for DOE to begin to dispose of SNF by the 1998 deadline and yet not take title to the SNF until a later date. As the utilities point out, it is not unusual, particularly in the nuclear area, to recognize a division between ownership of materials and other obligations relating to such materials. For example, the Nuclear Regulatory Commission recognizes a distinction between the ownership of nuclear materials and the right to possess or use such materials. *See also* 10 C.F.R. § 70.20; 10 C.F.R. § 40.21.

In fact, a comparison of paragraphs (A) and (B) argues against the Department's position. In (A), Con-

gress expressly conditioned the obligation of the Secretary on the commencement of the operation of a repository. In (B), Congress imposed no such condition, but rather directed the beginning of the Secretary's duty as "not later than January 31, 1998," without qualification or condition. The only limitation placed on the Secretary's duties under (B) is that that duty is "in return for the payment of fees established by this section." The Department's treatment of this statute is not an interpretation but a rewrite. It not only blue-pencils out the phrase "not later than January 31, 1998," but destroys the *quid pro quo* created by Congress. It does not survive the first step of the *Chevron* analysis. 467 U.S. at 842-43, 104 S. Ct. at 2781-82. Under the plain language of the statute, the utilities anticipated paying fees "in return for [which] the Secretary" had a commensurate duty. She was to begin disposing of the high-level radioactive waste or SNF by a day certain. The Secretary now contends that the payment of fees was for nothing. At oral argument, one of the panel compared the government's position to a Yiddish saying: "Here is air; give me money," and asked counsel for the Department to distinguish the Secretary's position. He found no way to do so, nor have we.

Finally, respondent asserts that reading subsection (B) as creating an unconditional obligation cannot be reconciled with other requirements of the statute, noting that the NWPA provides a complex scheme for the authorization, construction and licensing of a repository or monitored retrieval storage facility. DOE contends that "many contingencies facing the commencement of repository operations strongly undercut the assumption that Congress intended to require disposal by 1998 no matter what the outcome."

Although Congress anticipated the existence of a repository by 1998, the fact that such a repository does not exist does not make subsection .(B) illogical; it simply affects the remedy we can provide. We agree with DOE that Congress contemplated a facility would be available by 1998; however, that Congress contemplated such a facility would be available does not mean that Congress conditioned DOE's obligation to begin acceptance of SNF on the availability of a facility. It does not make sense to assert that Congress would express an intent to exempt DOE from the January 31, 1998 deadline by including specific statutory procedures regarding the siting and development of a repository in the NWPA. Rather, these prerequisites evince a strong congressional intent that DOE's various obligations be performed in a timely manner. *See, e.g., Tennessee v. Herrington*, 806 F.2d 642, 648 (6th Cir. 1986) ("[T]he overall structure of the Act does reveal a consistent concern for timely implementation of the disposal provisions."), *cert. denied*, 480 U.S. 946, 107 S. Ct. 1604, 94 L.Ed.2d 790 (1987). DOE's interpretation of the provisions does not harmonize them. Instead, its interpretation reads into section 302(a)(5)(B) language that appears only in section 302(a)(5)(A) and reads out of section 302(a)(5)(B) language that actually appears in that provision.

It is premature to determine the appropriate remedy, particularly as to the interaction between Article XI and Article XVI of the Standard Contracts, as DOE has not yet defaulted upon either its statutory or contractual obligation. We therefore will remand this matter for further proceedings consistent with this opinion.

Conclusion

In conclusion, we hold that the petitioners' reading of the statute comports with the plain language of the measure. In contrast, the agency's interpretation renders the phrase "not later than January 31, 1998" superfluous. Thus, we hold that section 302(a)(5)(B) creates an obligation in DOE, reciprocal to the utilities' obligation to pay, to start disposing of the SNF no later than January 31, 1998. The decision of the Secretary is vacated, and the case is remanded for further proceedings consistent with this opinion.

APPENDIX E

1. Section 119 of the Nuclear Waste Policy Act of 1982 (NWPA), as amended, 42 U.S.C. 10139, provides in pertinent part:

(a) Jurisdiction of the court of appeals

(1) * * * the United States courts of appeals shall have original and exclusive jurisdiction over any civil action–

> (A) for review of any final decision or action of the Secretary * * * under this part;
>
> (B) alleging the failure of the Secretary * * * to make any decision, or take any action, required under this part;
>
> * * * * *

(c) Deadline for commencing action

A civil action for judicial review described under subsection (a)(1) of this section may be brought not later than the 180th day after the date of the decision or action or failure to act involved, as the case may be, except that if a party shows that he did not know of the decision or action complained of (or of the failure to act), and that a reasonable person acting under the circumstances would not have known, such party may bring a civil action not later than the 180th day after the date such party acquired actual or constructive knowledge of such decision, action, or failure to act.

2. Section 302(a) of the NWPA, as amended, 42 U.S.C. 10222(a), provides in relevant part:

(a) Contracts

(1) In the performance of his functions under this chapter, the Secretary [of Energy] is authorized to enter into contracts with any person who generates or holds title to high-level radioactive waste, or spent nuclear fuel, of domestic origin for the acceptance of title, subsequent transportation, and disposal of such waste or spent fuel. Such contracts shall provide for payment to the Secretary of fees pursuant to paragraphs (2) and (3) sufficient to offset expenditures described in subsection (d) of this section.

* * * * *

(5) Contracts entered into under this section shall provide that—

> (A) following commencement of operation of a repository, the Secretary shall take title to the high-level radioactive waste or spent nuclear fuel involved as expeditiously as practicable upon the request of the generator or owner of such waste or spent fuel; and
>
> (B) in return for the payment of fees established by this section, the Secretary, beginning not later than January 31, 1998, will dispose of the high-level radioactive waste or spent nuclear fuel involved as provided in this subchapter.

(6) The Secretary shall establish in writing criteria setting forth the terms and conditions under which such disposal services shall be made available.

(2)

No. 98-384

In The Supreme Court Of The United States

October Term, 1997

FILED

NOV 2 - 1998

OFFICE OF THE CLERK
SUPREME COURT, U.S.

UNITED STATES OF AMERICA, ET AL.,

Petitioners,

v.

NORTHERN STATES POWER COMPANY, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR STATE RESPONDENTS IN OPPOSITION

FRANK J. KELLEY
Attorney General of Michigan

Thomas L. Casey
Solicitor General of Michigan
Counsel of Record
P.O. Box 30212
Lansing, Michigan 48909
(517) 373-1124

David A. Voges
Henry J. Boynton
Assistant Attorneys General

Attorneys for Respondents
State of Michigan and Michigan
Public Service Commission

(Additional counsel for State Respondents
are listed in the Appendix)

53 pp

QUESTIONS PRESENTED

1. Whether the court of appeals has the jurisdiction to issue a mandamus to enforce the Nuclear Waste Policy Act of 1982 and to preserve the integrity of its prior, unappealed decision in *Indiana Michigan Power Co. v Dep't. of Energy*, 88 F.3d 1272 (D.C. Cir., 1996) that held the Department of Energy ("DOE") has an unconditional obligation to take spent nuclear fuel by January 31, 1998.

2. Whether the court of appeals' decision below should be reviewed, not for the reasons stated in DOE's petition, but rather for the reasons stated in the petition filed by State Respondents in *State of Michigan, et al. v United States Dep't of Energy, et al.*, No. 98-225.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

INDEX OF AUTHORITIES iv

STATEMENT 1

ARGUMENT 10

I. DOE ERRONEOUSLY PORTRAYS THIS CASE AS AN ACTION FOR DAMAGES SUBJECT SOLELY TO COURT OF FEDERAL CLAIMS JURISDICTION UNDER THE TUCKER ACT, DESPITE THE FACT THAT RESPONDENTS' PETITIONS WERE TO ENFORCE THE NWPA UNDER THE ORIGINAL AND EXCLUSIVE JURISDICTION OF THE COURT OF APPEALS 10

II. THE COURT OF APPEALS PROPERLY ISSUED A MANDAMUS TO ENFORCE THE NWPA AND TO PRESERVE THE INTEGRITY OF ITS PRIOR DECISION 13

III. THE COURT OF APPEALS HAD THE AUTHORITY TO ISSUE A MANDAMUS UNDER NWPA §119 AND THE ALL WRITS ACT 18

IV. THE COURT OF APPEALS' MANDAMUS DOES NOT INTERFERE WITH THE STANDARD CONTRACT 20

V. DOE'S THEORY THAT THE STANDARD CONTRACT DELAYS CLAUSE WAS NOT CHALLENGED ON A TIMELY BASIS IS WITHOUT MERIT 21

VI. THE COURT OF APPEALS' DECISION SHOULD BE REVIEWED, NOT FOR THE REASONS SET FORTH IN DOE'S PETITION, BUT RATHER FOR THE REASONS SET FORTH IN THE PETITION FILED BY STATE RESPONDENTS IN *STATE OF MICHIGAN, ET AL. v. UNITED STATES DEP'T OF ENERGY, ET AL.*, NO. 98-225 25

CONCLUSION 29

INDEX OF AUTHORITIES

CASES

Chevron USA, Inc. v Natural Resources Defense Council, Inc.,
467 U.S. 837; 104 S. Ct. 2778;
81 L. Ed. 2d 694 (1984) 24

Comm'r of IRS v Schleier,
515 U.S. ___; 115 S. Ct. 2159;
132 L. Ed. 2d 294 (1995) 16

Commonwealth Edison Co v United States Dep't of Energy,
877 F.2d 1042 (D.C. Cir. 1989) 16

Indiana Michigan Power Co. v Dep't. of Energy,
88 F.3d 1272 (D.C. Cir., 1996) ..... 4, *passim*

Louisiana Public Service Comm. v FCC,
476 U.S. 355 (1986) 17

Northern States Power Company v Department of Energy, 128 F.3d 754 (D.C. Cir. 1997) .... 6, *passim*

Pan American Petroleum Corp. v Superior Court,
366 U.S. 656 (1961) 12

State of Idaho v Dep't of Energy,
945 F.2d 295 (9th Cir., 1991) 9

The Fair v Kohler Die & Specialty Co.,
228 U.S. 22 (1913) 12

Zobrest v Catalina Foothills School Dist.,
509 U.S. 1 (1993) 24

STATUTES AND REGULATIONS

Administrative Procedures Act,
5 U.S.C. §706(1) 6

All Writs Act,
28 U.S.C. §1651(a) 6, 18-19

Declaratory Judgment Act,
28 U.S.C. §2201 6

Notice of Inquiry on Waste Acceptance Issues,
59 Fed. Reg. 27,007 (May 25, 1994) 3-4

Nuclear Waste Policy Act of 1982 ("NWPA"),
42 U.S.C. §§10101 *et seq.* ..... 1, *passim*
§111, 42 U.S.C. § 10131 23
§111(b)(1), 42 U.S.C. §10131(b)(1) 23
§111(b)(2), 42 U.S.C. §10131(b)(2) 23
§119, 42 U.S.C. §10139 ..... 2, *passim*
§119(a), 42 U.S.C. §10139(a) 10
§119(a)(1)(A), 42 U.S.C. §10139(a)(1)(A) .. 4
§119(a)(1)(B), 42 U.S.C. §10139(a)(1)(B) ... 8
§119(c), 42 U.S.C. §10139(c) 24
§302(a)(5)(B), 42 U.S.C. §10222(a)(5)(B) ...1, *passim*

MISCELLANEOUS

H.R. Rep. No. 491, 97th Cong., 2nd Sess., pt. 1, (1982)
p. 28, 1982 U.S.C.C.A.N. 3794..... 28
p. 29, 1982 U.S.C.C.A.N. 3795..... 27-28
p. 30, 1982 U.S.C.C.A.N. 3796..... 26

48 Fed Reg. (1983)
p. 16,596 22

59 Fed. Reg. (1994)
p. 22,829-22,835..... 9
p. 27,007 3

60 Fed. Reg. (1995)
p. 21,793..... 3
p. 21,797..... 1

STATEMENT

The State Respondents[1] file this brief in opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit, filed by the United States of America, the United States Department of Energy, and the Secretary of Energy (collectively, "DOE").

1. DOE's Statement fails to accurately describe the origins of this controversy or how the DOE has consistently sought to evade its duties under the Nuclear Waste Policy Act of 1982 ("NWPA"), 42 U.S.C. §§10101 *et seq.*, and avoid any liability for its actions or failures to act.

2. From 1982, when the NWPA was enacted, until 1993, the DOE repeatedly advised Congress and others that the January 31, 1998 deadline for accepting high level radioactive waste/spent nuclear fuel ("SNF") was achievable and that NWPA §302(a)(5)(B), [42 U.S.C. §10222(a)(5)(B)], required nothing less.[2] The

---

[1]The State Respondents are comprised of States, State Utility Regulatory Commissions, Municipal Utilities, and national associations, who were Petitioners below in court of appeals No. 97-1065.

[2]See, e.g., September 7, 1984 letter of Department of Energy Secretary Donald P. Hodel to Senator Bennett Johnston ("the overall thrust of the Act, will create an obligation for the Department to accept spent fuel in 1998 whether or not a repository is in operation"). Reprinted in part at 60 Fed. Reg. 21,797 (1995); *also see* December 17, 1992 letter of Department of Energy Secretary James D. Watkins to Senator Bennett Johnston ("I believe this new strategy for the Department and Congress will

States, the utilities operating nuclear plants and the public relied upon the DOE's repeated assurances that it would, after decades of federal failure, begin to accept the SNF by January 31, 1998. Based on these assurances, the utilities and the millions of ratepayers nationwide, whom the State Respondents represent, poured billions of dollars[3] into the Nuclear Waste Fund in full compliance with the NWPA and with the full expectation that DOE would begin taking SNF by the statutory deadline of January 31, 1998.

3. In November, 1993, regulatory officials and utility executives from Michigan, Minnesota and Florida wrote to then DOE Secretary Hazel O'Leary, asking whether the DOE would be able to comply with the January 31, 1998 deadline for accepting SNF as required by NWPA §302(a)(5)(B). Secretary O'Leary thereafter responded that the DOE did not have a legal obligation under the NWPA to accept SNF absent an operational repository.

4. In June, 1994, within 180 days after being advised of this new DOE position, the State Respondents and Utility Respondents filed, pursuant to the NWPA §119, Petitions for Review of the DOE's

---

produce the results needed to begin SNF receipt in 1998"). A copy of Admiral Watkins' letter was included as Attachment F to the State Respondents' Petition for a Writ of Mandamus in No. 97-1065.

[3]The contributions to the Nuclear Waste Fund, including both payments and interest, totaled approximately $13.1 billion as of December 31, 1996. A compilation of payments, by state, to the Nuclear Waste Fund, was included as Attachment A to the Joint Reply of State Petitioners in No. 97-1065. It is estimated that the total now exceeds $15 billion.

determinations with the U.S. Court of Appeals for the District of Columbia Circuit. The Utilities' petition and States' petition were docketed as No. 94-1457 and 94-1458, respectively.[4] The State Respondents' petition requested, *inter alia*, a declaratory judgment reversing DOE's determination, an order directing DOE to develop a plan to allow it to accept SNF by January 31, 1998 along with a 6 month reporting requirement for DOE to describe its progress, and the escrowing of payments into an external trust fund.

5. Shortly before the filing of the Utility and State petitions, the DOE issued a Notice of Inquiry on Waste Acceptance Issues, 59 Fed. Reg. 27,007 (1994) which reiterated its earlier-stated position, but characterized it as a preliminary finding, and initiated a proceeding to receive comments on that position. Nearly one year later, after receiving comments from over a thousand parties, DOE issued its "Final Interpretation on Nuclear Waste Acceptance Issues under the Nuclear Waste Policy Act of 1982" ("Final Interpretation") 60 Fed. Reg. 21,793 (1995). In that decision, the DOE determined that under the NWPA its obligation to accept SNF by January 31, 1998 was conditioned upon the existence of operational disposal facilities. The State and Utility Respondents again filed petitions with the court of appeals to review DOE's Final Interpretation. The Utilities' petition was docketed as No. 95-1279 and the States' petition was docketed as No. 95-1321. The State Respondents'

---

[4]DOE filed a Motion to Dismiss the petitions in 94-1457 and 94-1458 arguing that the DOE's response did not constitute final agency action.

petition in No. 95-1321 sought the same relief as their earlier petition in 94-1458.

6. In *Indiana Michigan v Department of* Energy, 88 F.3d 1272 (D.C. Cir. 1996), the court of appeals in Nos. 95-1279 and 95-1321[5] reversed and vacated the DOE's Final Interpretation, stating:

> In (B) [NWPA §302(a)(5)(B)], Congress . . . directed the beginning of the Secretary's duty as "not later than January 31, 1998," without qualification or condition. The only limitation placed on the Secretary's duty under (B) is that that duty is "in return for the payment of fees established by this section." The Department's treatment of this statute is not an interpretation but a rewrite. It not only blue-pencils out the phrase "not later than January 31, 1998," but destroys the *quid pro quo* created by Congress.

Pet. App. 36a. The court of appeals concluded:

> Under the plain language of the statute, the utilities anticipated fees "in return for [which] the Secretary" had a commensurate duty. She was to begin

---

[5]On July 28, 1995, the court of appeals dismissed the earlier filed petitions in Nos. 94-1457 and 94-1458, finding that DOE's Notice of Inquiry did not constitute final agency action and therefore the court was without jurisdiction under NWPA §119(a)(1)(A).

> disposing of the high level radioactive waste or SNF by a *day certain*. The Secretary now contends that the payment of fees was for nothing. At oral argument, one of the panel compared the government's position to a Yiddish saying: "Here is air; give me money," and asked counsel for the Department to distinguish the Secretary's position. He found no way to do so, nor have we.

Pet. App. 36a. (emphasis added). The court of appeals then remanded the matter to DOE.

7. In the four months following *Indiana Michigan*, DOE did not seek rehearing and did not seek this Court's review. In fact, the DOE did nothing. The State Respondents then wrote DOE asking what it was doing to comply with *Indiana Michigan*. The DOE responded that it would not be able to comply with its unconditional obligation to begin taking SNF by January 31, 1998. It then solicited comments how its delay could be accommodated. Thereafter, the DOE commenced an administrative proceeding in which it found that its delay in complying with the January 31, 1998 deadline (set by the NWPA 15 years earlier) had been unavoidable.

8. On January 31, 1997, the Utility and State Respondents returned to the court of appeals, each filing petitions which were docketed as Nos. 97-1064 and 97-1065, respectively. Invoking the Court's

jurisdiction under Section 119 of the NWPA, 42 U.S.C. §10139, Administrative Procedures Act, 5 U.S.C. § 706(1), Declaratory Judgment Act, 28 U.S.C. § 2201, and the All Writs Act, 28 U.S.C. §1651(a), the State Respondents requested the same relief as in their previous petitions in Nos. 94-1458 and 95-1321 and added the request for an order of mandamus.

9. The court of appeals ordered that the petitions be refiled as mandamus petitions in conformity with D.C. Cir. Rule 21(a). Thereafter, in *Northern States Power Company v Department of Energy*, 128 F.3d 754 (D.C. Cir. 1997), the Court held:

> [W]e do not grant petitioners' broad request for a writ of mandamus because we conclude that the remedial scheme of the Standard Contract offers a potentially adequate remedy. We do, however, grant the petition in part because DOE has not abided by our prior conclusion that the NWPA imposes an unconditional obligation on the Department to begin disposal of the SNF by January 31, 1998. We therefore issue a writ of mandamus precluding DOE from excusing its own delay on the grounds that it has not yet prepared a permanent repository or interim storage facility. We retain jurisdiction over this case pending compliance with the mandate issued herewith.

Pet. App. 14a.

10. DOE and Yankee Atomic Power Company each filed Petitions for Rehearing of the *Northern States* decision. DOE's rehearing petition *inter alia*, stated that it was considering using Nuclear Waste Fund monies to pay for damages caused by its failure to begin to accept SNF by January 31, 1998.

11. In accordance with the Court's retained jurisdiction, the State Respondents and Utility Respondents then filed motions seeking further enforcement including an order barring DOE from forcing the utilities and their ratepayers to fund their own damages due to DOE's failure to act. The State Petitioners' motion sought the same relief requested in earlier petitions, but because of DOE's continued efforts to circumvent its unconditional obligation under the NWPA to take SNF by January 31, 1998, the State Petitioners also asked for the appointment of a Special Master to monitor DOE's compliance.

12. In an unpublished order issued May 5, 1998, the court of appeals denied both Rehearing Petitions and the Motions filed by State and Utility Respondents. Pet. App. 15a-19a. The order starkly conflicts with the earlier decisions in *Indiana Michigan* and *Northern States* by finding that while Congress created an unconditional obligation for DOE to take SNF, Congress did not require performance of that obligation:

> While the statute requires the DOE to include an unconditional obligation in the Standard Contract, it does not itself require performance. Breach by the

> DOE does not violate a statutory duty; thus, our jurisdiction to hear allegations of failure to take an action required under the NWPA, see 42 U.S.C. § 10139(a)(1)(B), does not provide a basis for a move-fuel order.

Pet. App. 18a. Subsequently, in an order dated July 2, 1998, the court of appeals terminated its continuing jurisdiction over the matter, and dismissed all pending cases. Pet. App. 23a.

13. On August 3, 1998, the State Respondents filed their own petition for a writ of certiorari seeking review of the court of appeals' May 5, 1998 determination that the NWPA did not impose an enforceable statutory duty on DOE to take SNF by January 31, 1998 and the court of appeals' failure to exercise its jurisdiction under NWPA §119 to remedy DOE's refusal to comply with its statutory duty (including the court of appeals' July 2, 1998 dismissal orders). That petition has been docketed as *State of Michigan, et al. v United States Dep't of Energy, et al.*, No. 98-225.

14. The court of appeals' May 5, 1998 order has also spawned a multiplicity of lawsuits. Eleven utilities have filed separate actions for damages in the Court of Federal Claims. Five utilities have jointly filed a lawsuit in the U.S. Court of Appeals for the District of Columbia Circuit in *Consolidated Edison Co. of New York, et al v U.S. Dep't of Energy*, No. 98-1358 and have

invoked that court's original and exclusive jurisdiction under NWPA §119 to review certain DOE actions.

15. The direct consequence of the court of appeals determination is that there is no binding plan or enforceable, date-certain schedule as to when DOE will begin to accept SNF, even though DOE has the capability to accept SNF.[6] Nevertheless, DOE contends that Respondents remain obligated to pay additional billions of dollars into the Nuclear Waste Fund despite DOE's continuing failure to comply with NWPA §302(a)(5)(B).

---

[6]DOE has amply demonstrated the capability to accept SNF. DOE currently transports, accepts and stores SNF from 41 foreign countries and certain domestic sources. See, "Finding of No Significant Impact for the Urgent-Relief Acceptance of Foreign Research Reactor Spent Nuclear Fuel," 59 Fed. Reg. 22,829-22,835 (1994). Also, at oral argument in *Northern States*, counsel for DOE admitted that it is physically possible for the DOE to accept SNF and acknowledged that the DOE in arguments before the Ninth Circuit stated that it had plenary authority under the Atomic Energy Act to store SNF from a commercial reactor at a DOE facility. See, *Northern States Power Co., et al., v Dep't of Energy, et al.*, No. 97-1064, transcript of proceedings, pp.29-36 (September 25, 1997); see also, DOE Brief, pp.25-28 (dated August 5, 1991) in *State of Idaho v Dep't of Energy*, No. 91-70094, 945 F.2d 295 (9th Cir., 1991), attached as Exhibit 1 to Utility Petitioners' Reply in Support of Petition for a Writ of Mandamus in 97-1064.

ARGUMENT

I. DOE ERRONEOUSLY PORTRAYS THIS CASE AS AN ACTION FOR DAMAGES SUBJECT SOLELY TO COURT OF FEDERAL CLAIMS JURISDICTION UNDER THE TUCKER ACT, DESPITE THE FACT THAT RESPONDENTS' PETITIONS WERE TO ENFORCE THE NWPA UNDER THE ORIGINAL AND EXCLUSIVE JURISDICTION OF THE COURT OF APPEALS.

Throughout its petition, DOE portrays this litigation as involving a contractual claim under the Standard Contract, which DOE then claims is subject to the exclusive jurisdiction of the Court of Federal Claims. However, the State Respondents invoked the court of appeals' original and exclusive jurisdiction under NWPA §119[7] and related statutes. In short, neither the Utility nor State Respondents' petitions in the court of appeals ever involved an action for damages or any other contractual claim subject to the Tucker Act.

---

[7]NWPA, §119(a) is unequivocal in granting the court of appeals' "original and exclusive jurisdiction over any civil action -- (A)for review of any final decision or action of the Secretary ... (B)alleging the failure of the Secretary ... to make any decision, or take any action, required under this subtitle ... (C)challenging ... any decision made, or action taken ... Section 119(b) in setting the time for filing any action, refers to "the date of the decision or action or failure to act involved...". This statutory provision evidences the concern of Congress for DOE to perform and to do so on a timely basis.

The Utility and State Respondents initially sought review in the court of appeals, in accordance with NWPA §119, within 180 days of DOE's first pronouncements in 1993 and 1994 of its newly minted interpretation that its statutory obligation to take SNF by January 31, 1998 was conditional and thus wholly deferrable. The Respondents also sought timely review of DOE's Final Interpretation.[8]

Following *Indiana Michigan*, DOE did not undertake any action to comply with that court's decision and remand. Instead, DOE persisted in its attempt to treat this case as involving a request for contractual remedies. The Utility and State Respondents returned to the court of appeals with subsequent petitions, pursuant to NWPA §119 and related statutes, to seek enforcement of the decision and mandate in *Indiana Michigan* and the NWPA.

In its ensuing decision in *Northern States*, the court of appeals again held that the NWPA imposed upon the DOE an unconditional obligation to begin disposal of SNF, beginning not later than January 31, 1998. In *Northern States*, the court exhaustively reviewed the history of this litigation, and clearly continued to adhere to the finding that "Congress ... dictated ... the deadline by which DOE must begin disposing of the SNF." Pet. App. 3a. While the court of appeals did not grant the broad mandamus and other relief requested by the State Respondents, it did grant a

---

[8]DOE's Final Interpretation as described in DOE's Petition, p.8, also stated that if the obligation to accept SNF no later than January 31, 1998 was unconditional, that the Delays Clause of the Standard Contract would supply the appropriate remedy.

Limited Mandamus to enforce DOE's statutory duty, finding that this statutory duty was not subservient to DOE's interpretation of the Standard Contract.

The gist of DOE's Petition is a revisionist one -- that Respondents' actions in this litigation involved contractual claims -- when in fact Respondents' actions always involved statutory claims, or otherwise have sought to enforce the NWPA or the court of appeals' decisions. As this Court has noted, "the party who brings a suit is master to decide what law he will rely upon." *Pan American Petroleum Corp. v Superior Court*, 366 U.S. 656, 662 (1961) (citing *The Fair v Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913)). Thus, the DOE cannot transform this case into a contract action for damages when the State Respondents' actions have always involved solely statutory claims. Although State Respondents believe the court of appeals erred seriously in confining its mandate to the Limited Mandamus, the court of appeals was nonetheless clearly within its jurisdiction and authority to enforce its prior decision.[9]

---

[9]Because the State Respondents believe the court of appeals below erred, not for the reasons alleged by DOE, but rather for the reasons alleged by the State Respondents, this Court should grant review. See Argument VI, *infra*.

II. THE COURT OF APPEALS PROPERLY ISSUED A MANDAMUS TO ENFORCE THE NWPA AND TO PRESERVE THE INTEGRITY OF ITS PRIOR DECISION.

Contrary to DOE's arguments, the court of appeals has the jurisdiction and authority to issue a writ of mandamus to enforce the NWPA and preserve the integrity of its prior decision in *Indiana Michigan*. As the court of appeals noted in *Northern States* (Pet. App. 13a), DOE has consistently attempted to find ways to avoid complying with the NWPA's January 31, 1998 deadline:

> Given DOE's repeated attempts to excuse its delay on the ground that it lacks an operational repository or interim storage facility, we find it appropriate to issue a writ of mandamus to correct the Department's misapprehension of our prior ruling. Accordingly, we order DOE to proceed with contractual remedies in a manner consistent with NWPA's command that it undertake an unconditional obligation to begin disposal of the SNF by January 31, 1998. More specifically, we preclude DOE from concluding that its delay is unavoidable on the ground that it has not yet prepared a permanent repository or that it has no authority to provide storage in the interim.

The court of appeals plainly stated that it was issuing its Mandamus to prevent the DOE from continuing to use an argument that that court had *already* rejected:

> Put another way, DOE's position is that its delayed performance is unavoidable because it does not have an operational repository, and does not have the authority to provide storage in the interim. DOE is simply recycling the arguments rejected by this court in *Indiana Michigan*. DOE unsuccessfully argued in that case that it does not have an obligation to take the SNF in the absence of an operational repository or other facility; here, DOE recycles that same argument in the slightly different form that it does not have responsibility for the costs resulting from its failure to perform that duty because it does not have an operational repository or other facility. As we pointed out in *Indiana Michigan*, the NWPA directs DOE to undertake the duty to begin taking the SNF by January 31, 1998, whether or not it has a repository or interim storage facility. DOE cannot now render its obligation contingent, and free itself of the costs caused by its delay, by advancing the same failed position that we rejected before.

Pet. App. 12a-13a. Furthermore, as the court of appeals noted, if the DOE were allowed to recycle its argument on remand, it would be using the contract to defeat the statute:

> We held in *Indiana Michigan* that the NWPA imposes an unconditional duty on DOE to take the materials by 1998. Congress, in other words, directed DOE to assume an unqualified obligation to take the materials by the statutory deadline. Under the Department's interpretation of the governing contractual provisions, however, the government can always absolve itself from bearing the costs of its delay if the delay is caused by the government's own acts. This cannot be a valid interpretation, as it would allow the Executive Branch to void an unequivocal obligation imposed by Congress. DOE has no authority to adopt a contract that violates the directives of Congress, just as it cannot implement interpretations of the contract that contravene this court's prior ruling. We hold that this provision in the Standard Contract, insofar as it is applied to DOE's failure to perform by 1998, is inconsistent with DOE's statutory obligation to assume an unconditional duty.

Pet. App. 13a-14a. The court of appeals thus clearly issued its mandamus specifically to enforce the NWPA and to protect the integrity of its prior decision in *Indiana Michigan*.

Despite these clear explanatory statements by the court of appeals, the DOE has sought to invent a conflict between two federal courts where none exists. DOE argues that since the words "avoidable" and "unavoidable" appear only in the Standard Contract, this case goes directly, and exclusively, to the manner in which the Standard Contract is construed and its remedial provisions implemented. Pet.16. The DOE's argument that the court of appeals has impermissibly intruded upon the jurisdiction of the Court of Federal Claims misses the point. This argument may be rejected for at least two reasons.

First, the DOE cannot seriously contend that the Standard Contract takes precedence over the statute. The issue in *Northern States* was not how the words "avoidable" or "unavoidable" were to be construed, but rather, whether the DOE's actions on remand from *Indiana Michigan* were consistent with the NWPA's command for an unconditional DOE obligation. The DOE cannot circumvent the plain language of a statute by relying on its own regulation[10] interpreting that statute. *Comm'r of IRS v Schleier*, 515 U.S. ___; 115 S. Ct. 2159; 132 L. Ed. 2d 294, 304-305 (1995). *See also,*

---

[10]In *Commonwealth Edison Co v United States Dep't of Energy*, 877 F.2d 1042 (D.C. Cir. 1989), the U.S. Court of Appeals for the District of Columbia Circuit held that the Standard Contract was far more akin to a regulation in the manner and procedure by which it was adopted.

Louisiana Public Service Comm. v FCC, 476 U.S. 355, 374-375 (1986). Congress intended that the Standard Contract with utilities be used as a vehicle to *guarantee* performance by January 31, 1998. Indeed, this is the hallmark of the NWPA - that there be a definite deadline for DOE performance in return for the billions of dollars paid by utilities and their ratepayers. Instead, DOE interprets the Standard Contract to excuse its failure to take SNF by the January 31, 1998 deadline set by Congress in NWPA §302(a)(5)(B). In short, once the DOE's "conditional obligation" argument was specifically rejected by the court of appeals in *Indiana Michigan*, the DOE could not then commence an administrative proceeding under the Standard Contract to excuse its "unconditional obligation" on the basis that the DOE does not have an operational repository or other interim storage.

Second, DOE's argument does not relate directly to the roots of *Northern States*, which was commenced to enforce the statute and the ruling in *Indiana Michigan*. The "avoidable" or "unavoidable" issues did not really exist until the DOE itself placed it at issue in response to the court of appeals' remand. Rather than making a good-faith effort to take steps to meet Congress' mandate in the NWPA that DOE begin to accept SNF by the January 31, 1998 deadline, the DOE has instead sought to use the contract argument to insulate it from the force and effect of *Indiana Michigan* which found that DOE's obligation to take SNF by the January 31, 1998 deadline was unconditional. Thus, DOE's contractual arguments are simply erroneous and irrelevant since the court of appeals in *Northern States* properly issued a mandamus to enforce the statute and

preserve its prior decision and mandate in *Indiana Michigan*.

III. THE COURT OF APPEALS HAD THE AUTHORITY TO ISSUE A MANDAMUS UNDER NWPA §119 AND THE ALL WRITS ACT.

DOE argues that the Mandamus is contrary to the All Writs Act, 28 U.S.C. §1651(a), because there is no prospect that the court of appeals will be called upon to resolve any future dispute that may arise concerning the proper interpretation of the Delays Clause of the Standard Contract. Pet.18.

DOE once again misstates the issue. As noted, the issue in *Northern States* was whether DOE's actions violated the plain language of the NWPA's mandate and contravened the court of appeals' remand in *Indiana Michigan*. The words "avoidable" or "unavoidable" were neither construed nor at issue in *Indiana Michigan*. Furthermore, the DOE's reading of the All Writs Act is erroneously selective. That Act [28 U.S.C. §1651(a)] provides that mandamus is appropriately issued when the case that it affects is:

> one that may lie within the prospective future jurisdiction of the Court of Appeals, *or that has in fact come within its jurisdiction in the past*. (emphasis added).

The question whether *DOE* had an unconditional obligation under NWPA §302(a)(5)(B) to take SNF by January 31, 1998 was squarely before the court of appeals in *Indiana Michigan* when it reviewed DOE's Final Interpretation. DOE neither challenged the court of appeals' jurisdiction to review the DOE's actions in *Indiana Michigan* nor did it appeal or seek rehearing of the same. Thus, it is incontrovertible that the case had, in fact, come within the court of appeals' jurisdiction in the past.

DOE is also incorrect in stating that "There . . . is no prospect that the D.C. Circuit will be called upon to resolve any future dispute that may arise concerning . . . the Standard Contract." Pet.19. As noted, this litigation arose under the statute, pursuant to NWPA § 119, and *not* under the Standard Contract. Moreover, it is likely that any future disputes will arise under the statute, including disputes flowing from this litigation. Quite simply, the court of appeals in this case, by directly enforcing the statute and its mandate in *Indiana Michigan*, was not acting pursuant to the Standard Contract, but was exercising its own "original and exclusive" jurisdiction under NWPA §119 and the All Writs Act and therefore was not intruding upon the jurisdiction of the Court of Federal Claims.[11] Thus, the court of appeals had the jurisdiction and authority to issue the Limited Mandamus.

---

[11] For the same reason, the DOE's analogy to *FCC v Iowa* Utilities *Board, et al*, No. 97-1519, is neither applicable nor relevant.

IV. THE COURT OF APPEALS' MANDAMUS DOES NOT INTERFERE WITH THE STANDARD CONTRACT.

DOE argues that the court of appeals' "apparent premise" was that DOE's failure to fulfill a contractual obligation "necessarily" requires the payment of damages for any losses incurred as a result of the breach. Pet. 20. DOE then argues that this "apparent premise" has no basis in the law of contracts and further that it threatens the very doctrine of *"force majeure." Id.* However, DOE's exponential leap in both logic and the degree of the error alleged is not based on an accurate or reasonable reading of what the court of appeals actually decided in *Northern States.*

Northern States was based on two considerations. The first was Congress' command in NWPA §302(a)(5)(B) that DOE's obligation to take SNF by January 31, 1998 is unconditional. The second was the court's remand in *Indiana Michigan* requiring DOE to undertake further actions consistent with that Congressional mandate. Consistent with those considerations, the court of appeals correctly viewed DOE's actions on remand from *Indiana Michigan* as nothing more than a transparent attempt to defy both the NWPA and the *Indiana Michigan* remand order. Thus, the "apparent premise" that DOE attributes to the court of appeals formed no basis for that court's Limited Mandamus.

Moreover, DOE erroneously engages in a belated, post-remand attempt to elevate the position of the Standard Contract's Delays Clause including "acts

of Government in either its sovereign or contractual capacity" into a legitimate *"force majeure"* situation authorizing limitless discretion to DOE to delay performance and to defy the statute and the court's rulings. DOE would use this phrase to destroy the statutory deadline, and the essential *"quid pro quo"* of the entire statute. The court of appeals correctly enforced the entire statute and its prior ruling by preventing DOE from using this phrase to override the unconditional nature of statute and to absolve itself from any potential consequences arising from its non-compliance.

V. DOE'S THEORY THAT THE STANDARD CONTRACT DELAYS CLAUSE WAS NOT CHALLENGED ON A TIMELY BASIS IS WITHOUT MERIT.

The DOE argues that the court of appeals' disposition of the case in *Northern States* may be due to an alternative explanation - that the unavoidable delays provision is, on its face, inconsistent with the NWPA. Pet. 23. The DOE concludes that since the Delays Clause of the Standard Contract was promulgated in 1983, the only time that its terms could be challenged was when it was promulgated. Since that time had long since passed when *Indiana Michigan* was commenced, DOE contends that the terms of the Standard Contract cannot be challenged. This argument is without merit for a number of reasons.

First, DOE's argument contains either a large measure of revisionist history or a perception conveniently unfettered by the facts. As previously

noted herein, at the time the NWPA was enacted and for a decade thereafter (including the time during which the Standard Contract was promulgated) the DOE repeatedly stated that NWPA §302(a)(5)(B) legally required it to begin to accept SNF by the January 31, 1998 deadline and that it would comply with that requirement. Thus, there was never any prior expectation that DOE would fail to begin accepting SNF by the statutorily mandated deadline. Furthermore, there was no basis to conclude that the Delays Clause would apply to the statutory command that DOE was required to accept SNF by January 31, 1998.[12] Moreover, all parties reasonably relied on

---

[12] Any challenge of the Standard Contract's delay provision within 180 days of its promulgation no doubt would have been met with a motion to dismiss by DOE on the basis of lack of case or controversy, or lack of ripeness, since DOE then urged that it was required to perform by 1998. Indeed, contemporaneous with promulgation of the Standard Contract, DOE's Sectional Analysis of the Contract, 48 Fed. Reg. 16,596 (1983) stated:

> Similarly, seven commenters addressed the question of DOE performance standards and Purchaser remedies with respect to performance. In essence, these commenters pointed out that no date exists other than the January 31, 1998 date to evaluate DOE's program performance. If that date is not met, these commenters say, the contract provides no specific remedies against DOE for failing to meet the date. DOE has considered this comment and the suggestion that suitable language be included in the contract, but it has decided not to adopt the recommended modification. We recognize that these issues are of concern to the utilities. However, we believe that we should be consistent with the language of the Act. *The 1998 date is called for in the Act, and we believe it to be a realistic date. Our performance will be judged by meeting this date.* If the intent of the Act was to have intermediate

DOE's own repeated interpretation of, and commitment to, the 1998 deadline until the time DOE indicated a reversal of its prior interpretation, first in the letter exchanges in late 1993 and early 1994, followed by the DOE comment proceeding culminating with the Final Interpretation. State and Utility Respondents commenced litigation against these DOE interpretations within 180 days of either of these events.[13]

Second, in addition to the plain language of NWPA §302(a)(5)(B), the findings and purposes section of NWPA, §111 (42 U.S.C. §10131) rules out any suggestion that NWPA could be interpreted as authorizing the promulgation of a regulation that would compromise Congress' January 31, 1998 deadline in NWPA §302(a)(5)(B). Clearly, such a regulation would undermine Congress' stated purposes in establishing a schedule, NWPA §111(b)(1), in establishing Federal responsibility, NWPA §111(b)(2), and in establishing a definite Federal policy, NWPA §111(b)(2).

Finally, the DOE's attempt to create a distinction between the *terms* of the Delays Clause (which DOE argues was subject to a 180-day appeal period starting in 1983) and the proper *interpretation* of that provision

---

performance standards or dates, they could have been specified in the Act. (Emphasis added).

[13]Also, it may again be noted that the initial 1994 petitions to the Court filed by State and Utility Petitioners were met by a Motion to Dismiss by DOE which urged that the Petitioners were too early, and that no action was ripe for review until DOE issued its Final Interpretation.

(which DOE claims is still subject to adjudication but only in the Court of Federal Claims) lacks merit. Pet.-23-24. The terms of a statute (or regulation) often are reviewed and considered in light of the underlying agency's interpretation thereof. In fact, this is part of the two-step statutory analysis required by *Chevron USA, Inc. v Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843; (1984), as properly utilized by the court in *Indiana Michigan* in reversing DOE's Final Interpretation. The error of DOE's claimed distinction is also underscored by the reliance all parties placed on DOE's 10-plus years of interpretations of, and commitment to, the January 31, 1998 statutory deadline. Also, there is NWPA §119(c) itself which would still authorize the State Respondents' petition leading to *Indiana Michigan* because it was filed within 180 days of becoming aware of DOE's reversal of over 10 years of policy and interpretation.

In any event, it is too late to present this argument. DOE should have made this argument below and having failed to should not be permitted to do so now. *Zobrest v Catalina Foothills School Dist.*, 509 U.S. 1, 8 (1993) ("Where issues are neither raised nor considered by the Court of Appeals, this Court will not ordinarily consider them.").

VI. THE COURT OF APPEALS' DECISION SHOULD BE REVIEWED, NOT FOR THE REASONS SET FORTH IN DOE'S PETITION, BUT RATHER FOR THE REASONS SET FORTH IN THE PETITION FILED BY STATE RESPONDENTS IN *STATE OF MICHIGAN, ET AL. v. UNITED STATES DEP'T OF ENERGY, ET AL.*, NO. 98-225.

DOE contends that the court of appeals' decision below intrudes on the jurisdiction of the Court of Federal Claims in that it has "pretermitted the orderly disposition of contract review." Pet.15. DOE further contends that review by this Court is warranted to restore the proper division of jurisdiction between the various federal courts so as to prevent disruption of an important national program. Pet. 15.

State Respondents agree that this is an important national program and further that review by this Court is warranted, *but not* for the reasons advanced by DOE. The court of appeals had the jurisdiction to issue its Mandamus in *Northern States* to enforce the NWPA and to preserve the integrity of its prior, unappealed decision in *Indiana Michigan*. As a review of the facts underlying *Northern States* plainly indicates, the court of appeals was acting to prevent *DOE's disruption* of this important national program.

The court of appeals, however, did not go far enough as there presently is no binding or enforceable deadline for DOE to begin accepting SNF. Furthermore, in the face of continued resistance by the DOE, State Respondents are without a means to obtain

court-ordered action to secure DOE's performance of its duties under the NWPA.

The January 31, 1998 deadline in NWPA §302(a)(5)(B) for DOE to begin taking SNF was a critical component of the NWPA[14] and the court of appeals' failure to take steps to enforce that deadline warrants this Court's review. Furthermore, by framing the issue as involving a contract dispute DOE has sought to pit one federal court against another, even though this litigation was commenced by State and Utility Respondents to enforce statutory duties placed upon DOE by the NWPA and has never involved contract actions for damages. The real issue is DOE's failure to perform its unconditional obligation, under NWPA §302(a)(5)(B), to take SNF beginning not later than January 31, 1998.

A conflict does exist and it is *not* between two different federal courts. Rather, it is within the Court of Appeals for the District of Columbia itself.[15] This is

---

[14]The essential elements embodied in the bill of the disposal program include: "Commitment to a waste disposal technology ..., Ultimate federal responsibility ... Total financial support ... A clear 'roadmap' of regulatory requirements ... *A legislated schedule for Federal decisions and actions for repository development*" ..., H.R. Rep. No. 491, 97th Cong., 2nd Sess., pt. 1, at 30 (1982), reprinted in 1982 U.S.C.C.A.N. at 3796 (emphasis added).

[15]The inconsistency between the court of appeals' published decisions in Indiana *Michigan* and *Northern States* and its unpublished May 5, 1998 rehearing order was acknowledged even by the DOE in its brief in opposition in 98-225:

> [Petitioners] argue (see Pet. 12-17) that the court of appeals' order denying the petitions for rehearing and

because the decisions in *Indiana Michigan* and *Northern States* clearly decide that DOE's unconditional obligation is a statutory one. However, the court of appeals' May 5, 1998 order makes the remarkable finding that while Congress created an *unconditional* obligation for DOE to take SNF, Congress did not require performance of that obligation. The court of appeals' May 5, 1998 order violates the fundamental purpose of the NWPA, expunges any trace of an enforceable deadline, trivializes the importance of the Congressional command, and constitutes an abdication of the court of appeals' review function under the NWPA §119.

Congress meant what it said when it created the unconditional obligation that DOE was required to take SNF by January 31, 1998. Any interpretation to the contrary defies the plain language and defeats the overriding purpose of NWPA §302(a)(5)(B). It stands the NWPA on its head by discarding the January 31, 1998 deadline for taking SNF, which was not only the *quid pro quo* of the NWPA's statutory bargain, but the key to the success of the waste disposal program envisioned by Congress[16] since the federal

---

motions to enforce the mandate (Pet. App. 17a-21a) is inconsistent with language in the court's prior opinions both in this case and in *Indiana Michigan*. We agree with petitioners that some language in those opinions suggests that DOE's duty to commence SNF disposal by January 31, 1998, is statutory rather than contractual in nature.

[16] "Although there is not unanimous agreement on all aspects of the nuclear waste management program, there is a solid consensus on major elements of the federal program, *and on the need for legislation to solidify a program and keep it on track.*" H.R. Rep. No.

government's inaction was the major failing for thirty years prior to the NWPA's enactment.[17] In the NWPA, Congress told DOE it had 16 years to get ready to begin taking the SNF. Sixteen years later, the DOE no longer has an enforceable or binding timetable to begin the acceptance of SNF from domestic nuclear power plants.

Unless this Court acts, the nation will be back where it was in the 1960's and 1970's. The only difference is that the ratepayers have paid billions of dollars and will continue to pay billions of additional dollars for nothing more than DOE's promise to take SNF. Thus, the *disruption* to the scheme established by Congress is due to the DOE itself and its pattern of conduct to not only avoid its duties under the NWPA, but also to avoid any liability for its failures to act. The court of appeals' determination in its May 5, 1998 order that Congress intended this nation's electric ratepayers to fund payments to the DOE, up to a projected total of more than $30 billion, in exchange for the minor ministerial act of DOE placing a few words in a contract is itself an absurd interpretation. For that reason, the State Respondents filed their petition in *State of Michigan, et al. v United States Dep't of Energy, et al.*, No. 98-225 and it is that petition, and not the DOE's petition here, that should be granted.

491, 97th Cong., 2nd Sess., pt. 1 at 29 (1982), reprinted in 1982 U.S.C. C. A N. at 3795 (emphasis added).

[17] "The failure of the government to provide a permanent waste disposal facility during more than 30 years of federal nuclear activities is unmitigated." H.R. Rep. No. 491, 97th Cong., 2nd Sess., pt. 1 at 28 (1982), reprinted in 1982 U.S.C.C.A.N. at 3794.

CONCLUSION

The DOE's petition for writ of certiorari should be denied and the State Respondents' petition for writ of certiorari in No. 98-225 should be granted.

Respectfully submitted,

FRANK J. KELLEY
Attorney General of Michigan

Thomas L. Casey
Solicitor General of Michigan
Counsel of Record
P.O. Box 30212
Lansing, Michigan 48909
(517) 373-1124

David A. Voges
Henry J. Boynton
Assistant Attorneys General

Attorneys for Respondents
State of Michigan, and Michigan
Public Service Commission

Dated: November 2, 1998
ussc/9856807

(Additional counsel for State Respondents are listed in the Appendix)

APPENDIX

APPENDIX

STATE OF MINNESOTA
MINNESOTA DEPARTMENT OF PUBLIC SERVICE
MINNESOTA PUBLIC UTILITIES COMMISSION

Hubert H. Humphrey III, Attorney General
J. Jeffrey Oxley, Assistant Attorney General
445 Minnesota Street, Suite 1200
St. Paul, MN 55101-2103

Don L. Keskey, By Special Appointment
225 South Troy St, Suite 230
Royal Oak, MI 48067
Telephone: (248) 584-0900
Fax: (248) 584-0975

ARIZONA CORPORATION COMMISSION

Eric A. Eisen
Eisen Law Office
10028 Woodhill Road
Bethesda, MD 20817
Telephone: (301) 469-8590
Fax: (301) 469-8120

Paul Bullis, Chief Counsel
Legal Division
Arizona Corporation Commission
1200 West Washington
Phoenix, AZ 85007
Telephone: (602) 542-3402
Fax: (602) 542-4870

STATE OF ARKANSAS

Winston Bryant, Attorney General
Shirley E. Guntharp, Deputy Attorney General
Charles L. Moulton, Assistant Attorney General
323 Center Street, Suite 200
Little Rock, AR 72201-2610
Telephone: (501) 682-2007
Fax: (501) 682-8084

ARKANSAS PUBLIC SERVICE COMMISSION

Mary W. Cochran, General Counsel
1000 Center Street
P.O. Box 1000
Little Rock, AR 72203-0400
Telephone: (501) 682-5846
Fax: (501) 682-5731

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Peter Arth, Jr.
Arocles Aguilar
Harvey Y. Morris
505 Van Ness Avenue
San Francisco, CA 94102
Telephone: (415) 703-1086
Fax: (415) 703-2262

STATE OF CONNECTICUT AND THE CONNECTICUT DEPARTMENT OF PUBLIC UTILITY CONTROL

Richard Blumenthal, Attorney General
Robert S. Golden, Jr., Assistant Attorney General
10 Franklin Square
New Britain, CT 06051
Telephone: (860) 827-2683
Fax: (860) 827-2613

STATE OF DELAWARE

M. Jane Brady, Attorney General
Michael F. Foster, State Solicitor
Charles F. Walker, Deputy Attorney General
Kevin P. Maloney, Deputy Attorney General
Department of Justice
820 N. French Street
Wilmington, DE 19801
Telephone: (302) 577-8400
Fax: (302) 577-6630

STATE OF FLORIDA

Michael A. Gross, Assistant Attorney General
Special Projects Section
Office of the Attorney General
PL-01 The Capitol
Tallahassee, FL 32399-1050
Telephone: (850) 414-3300
Fax: (850) 488-6589

FLORIDA PUBLIC SERVICE COMMISSION

Robert D. VanDiver, General Counsel
Richard C. Bellak, Associate General Counsel
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0862
Telephone: (850) 413-6248
Fax: (850) 413-7180

GEORGIA PUBLIC SERVICE COMMISSION

Thurbert E. Baker, Attorney General
Alan Gantzhorn, Senior Assistant Attorney General
40 Capitol Square, S.W.
Atlanta, GA 30334-1300
Telephone: (404) 656-7542
Fax: (404) 651-6341

STATE OF ILLINOIS

James E. Ryan, Attorney General
Carole R. Doris, Chief, Department of Public Advocacy
100 West Randolph Street, 12th Floor
Chicago, IL 60601
Telephone: (312) 814-3000
Fax: (312) 814-3806

ILLINOIS COMMERCE COMMISSION

Myra L. Karegianes, General Counsel
James E. Weging, Special Assistant Attorney General
Illinois Commerce Commission
160 N. LaSalle Street
Suite C-800
Chicago, IL 60601
Telephone: (312) 793-2877
Fax: (312) 793-1556

STATE OF INDIANA

Daniel B. Dovenbarger, Deputy Attorney General
402 W. Washington Street
Indianapolis, IN 46204
Telephone: (317) 233-6313
Fax: (317) 232-7979

STATE OF IOWA

Ben Stead
Iowa Department of Justice
Office of Consumer Advocate
4th Floor, Lucas State Office Building
Des Moines, IA 50319
Telephone: (515) 281-5984
Fax: (515) 242-6564

IOWA UTILITIES BOARD

Diane Munns, General Counsel
Iowa Utilities Board
Department of Commerce
350 Maple Street
Des Moines, IA 50319
Telephone: (515) 281-3448
Fax: (515) 242-5081

STATE OF KANSAS

Carla J. Stovall, Attorney General
John W. Campbell, Senior Deputy Attorney General
Kansas Judicial Center
Second Floor
Topeka, KS 66612-1597
Telephone: (785) 296-2215
Fax: (785) 296-6296

KANSAS CORPORATION COMMISSION

Glen W. Froelich, Assistant General Counsel
Kansas Corporation Commission
1500 SW Arrowhead Road
Topeka, KS 66604-4027
Telephone: (785) 271-3119
Fax: (785) 271-3167

COMMONWEALTH OF KENTUCKY

A. B. Chandler, III, Attorney General
James J. Grawe, Assistant Attorney General
State Capitol
700 Capitol Avenue
Frankfort, KY 40602-2000
Telephone: (502) 696-5300
Fax: (502) 564-2894

LOUISIANA PUBLIC SERVICE COMMISSION

Michael R. Fontham
Noel J. Darce
STONE, PIGMAN, WALTHER, WITTMANN & HUTCHINSON
546 Carondelet Street
New Orleans, LA 70130-3588
Telephone: (504) 581-3200
Fax: (504) 581-3361

Brian Eddington
General Counsel
Louisiana Public Service Commission
P.O. Box 91154
Baton Rouge, LA 70821-9154

STATE OF MAINE

Andrew Ketterer, Attorney General
Paul Stern, Assistant Attorney General
6 State House Station
Augusta, ME 04333-0006
Telephone: (207) 626-8568
Fax: (207) 287-3145

STATE OF MARYLAND

J. Joseph Curran, Jr., Attorney General
M. Brent Hare, Assistant Attorney General
Power Plant Research Program
580 Taylor Avenue
Annapolis, MD 21401
Telephone: (410) 260-7743
Fax: (410) 260-8670

MARYLAND PUBLIC SERVICE COMMISSION

Bryan G. Moorhouse, General Counsel
Susan S. Miller, Assistant General Counsel
Maryland Public Service Commission
6 St. Paul Centre
Baltimore, MD 21202
Telephone: (410) 767-8036
Fax: (410) 333-6495

COMMONWEALTH OF MASSACHUSETTS

Scott Harshbarger, Attorney General
Charles M. Wyzanski, Assistant Attorney General
Trial Division
200 Portland Street
Boston, MA 02114
Telephone: (617) 727-2200, ext 3093
Fax: (617) 727-3076

MISSISSIPPI PUBLIC SERVICE COMMISSION

George M. Fleming
Patricia L. Transham
Public Utilities Staff
Walter Sillers State Office Building
P.O. Box 1174
Jackson, MS 39215-1174
Telephone: (601) 961-5490
Fax: (601) 961-5804

MISSOURI PUBLIC SERVICE COMMISSION

Keith Krueger, Assistant General Counsel
P.O. Box 360
Jefferson City, MO 65102
Telephone: (573) 751-4140
Fax: (573) 751-9285

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS

Charles D. Gray, General Counsel
James Bradford Ramsay, Assistant General Counsel
National Association of Regulatory Utility Commissioners
Old Post Office Pavilion, Suite 603
1100 Pennsylvania Ave, N.W.
P.O. Box 684
Washington, D.C. 20044-0684
Telephone: (202) 898-2208
Fax: (202) 898-2213

STATE OF NEBRASKA

Don Stenberg, Attorney General
L. Steven Grasz, Deputy Attorney General
Linda L. Willard, Assistant Attorney General
2115 State Capitol
Lincoln, NE 68509-8920
Telephone: (402) 471-2757
Fax: (402) 471-3297

STATE OF NEW HAMPSHIRE

Wynn E. Arnold, Assistant Attorney General
Civil Bureau
33 Capitol Street
Concord, NH 03301-6397
Telephone: (603) 271-3658
Fax: (603) 271-2110

OFFICE OF CONSUMER ADVOCATE
STATE OF NEW HAMPSHIRE

James R. Anderson, Assistant Consumer Advocate
117 Manchester St.
Concord, NH 03301
Telephone: (603) 271-1172
Fax: (603) 271-1177

STATE OF NEW JERSEY BOARD OF PUBLIC UTILITIES

Peter Verniero, Attorney General
Caroline Vachier, Deputy Attorney General
Elise Goldblat, Deputy Attorney General
Division of Law
124 Halsey Street 5th Floor
P.O. Box 45029
Newark, NJ 07101
Telephone: (973) 648-4866
Fax: (973) 648-7156

NEW YORK STATE PUBLIC SERVICE COMMISSION

Lawrence G. Malone, Solicitor
Cheryl L. Callahan
Three Empire State Plaza, 17th Floor
Albany, NY 12243-1350
Telephone: (518) 474-6513
Fax: (518) 473-7081

NORTH CAROLINA UTILITIES COMMISSION

Sammy R. Kirby, Deputy General Counsel
P.O. Box 29510
Raleigh, NC 27626-0510
Telephone: (919) 733-0834
Fax: (919) 733-7300

NORTH DAKOTA PUBLIC SERVICE COMMISSION

Charles E. Johnson, Special Assistant Attorney General
William W. Binek, Special Assistant Attorney General
State Capitol
Bismarck, ND 58505
Telephone: (701) 328-4078
Fax: (701) 328-2410

PUBLIC UTILITIES COMMISSION OF OHIO

Betty D. Montgomery, Attorney General
Jeffrey S. Sutton, State Solicitor
Duane W. Luckey, Assistant Attorney General
Steven T. Nourse, Assistant Attorney General
Public Utilities Section
180 East Broad Street
Columbus, OH 43215-3793
Telephone: (614) 644-8762
Fax: (614) 644-8764

PENNSYLVANIA PUBLIC UTILITY COMMISSION

Lawrence F. Barth, Assistant Counsel
Karen O. Moury, Deputy Chief Counsel
Bodran R. Pankiw, Chief Counsel
Room 203, North Office Building
P.O. Box 3265
Harrisburg, PA 17105-3265
Telephone: (717) 772-8579
Fax: (717) 783-3458

PUBLIC SYSTEMS GROUP, CONSISTING OF AMERICAN PUBLIC POWER ASSOCIATION, MASSACHUSETTS MUNICIPAL WHOLESALE ELECTRIC COMPANY, CONNECTICUT MUNICIPAL ELECTRIC ENERGY COOPERATIVE, INC., PIEDMONT MUNICIPAL POWER ENERGY BRAINTREE, MASSACHUSETTS ELECTRIC LIGHT DEPARTMENT, CITY OF ANAHEIM, CALIFORNIA

Gary J. Newell
Frances E. Francis
SPIEGEL & McDIARMID
Suite 1100
1350 New York Avenue, N.W.
Washington, D.C. 20005-4798
Telephone: (202) 879-4000
Fax: (202) 879-4001 or 879-4081

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

Jeffrey B. Pine, Attorney General
Paul J. Roberti, Special Assistant Attorney General
150 South Main Street
Providence, RI 02903
Telephone: (401) 274-4400, ext 2231
Fax: (401) 273-4270

PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA

F. David Butler, General Counsel
Florence P. Belser, Staff Counsel
P.O. Drawer 11649
Columbia, SC 29211
Telephone: (803) 737-5117
Fax: (803) 737-5246

SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

Rolayne Ailts Wiest, Special Assistant Attorney General
500 East Capitol Avenue
State Capitol Building
Pierre, SD 57501-5070
Telephone: (605) 773-3201
Fax: (605) 773-3809

STATE OF VERMONT and
THE VERMONT PUBLIC SERVICE BOARD

William H. Sorrell, Attorney General
J. Wallace Malley, Jr., Deputy Attorney General
Mary McCabe, Assistant Attorney General
Office of the Attorney General
109 State Street
Montpelier, VT 05609-1001
Telephone: (802) 828-3171
Fax: (802) 828-2154

COMMONWEALTH OF VIRGINIA

Mark L. Earley, Attorney General
Roger L. Chaffee, Senior Assistant Attorney General
Carl Josephson, Assistant Attorney General
900 East Main Street
Richmond, VA 23219
Telephone: (804) 225-4004
Fax: (804) 786-0034

VIRGINIA STATE CORPORATION
COMMISSION

William H. Chambliss, Deputy General Counsel
C. Meade Browder, Jr., Attorney
Virginia State Corporation Commission
P.O. Box 1197
Richmond, VA 23218
Telephone: (804) 371-9671
Fax: (804) 371-9240

PUBLIC SERVICE COMMISSION OF WISCONSIN

Edward S. Marion, Chief Counsel
David Ludwig, Attorney
Electric Division
610 N. Whitney Way
P.O. Box 7854
Madison, WI 53707-7854
Telephone: (608) 266-5621
Fax: (608) 266-3957

(3)

No. 98-384

FILED
NOV 2 - 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

UNITED STATES OF AMERICA, ET AL.,
Petitioners,

v.

NORTHERN STATES POWER COMPANY, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF IN OPPOSITION FOR THE UTILITY RESPONDENTS

Of Counsel:
JERRY STOUCK
ROBERT L. SHAPIRO
SPRIGGS & HOLLINGSWORTH
1350 I Street, N.W.
9th Floor
Washington, D.C. 20005

PETER BUSCEMI
MORGAN, LEWIS & BOCKIUS, LLP
1800 M Street, N.W.
Washington, D.C. 20036

TAMI LYN AZORSKY
MCKENNA & CUNEO, LLP
1900 K Street, N.W.
Washington, D.C. 20006

JAY E. SILBERG
Counsel of Record
DAVID J. CYNAMON
SETH B. WAXMAN
SHAW PITTMAN POTTS
& TROWBRIDGE
2300 N Street, N.W.
Washington, D.C. 20037
(202) 663-8063

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

34 pp

QUESTION PRESENTED

Whether the court of appeals properly granted limited mandamus relief to enforce its final judgment in *Indiana Michigan Power Co. v. Department of Energy*, 88 F.3d 1272 (D.C. Cir. 1996), in which the court construed the Department of Energy's statutory obligations under Section 302(a)(5)(B) of the Nuclear Waste Policy Act of 1982, as amended, 42 U.S.C. § 10222(a)(5)(B) (1994).

RULE 29.6 LISTING

Pursuant to Supreme Court Rule 29.6, respondents joining in this Brief in Opposition (hereafter "Utility Respondents") list their respective parent companies and nonwholly owned subsidiaries as follows:

1. Respondent Northern States Power Company has no parent or nonwholly owned subsidiaries.

2. The parent company of respondent Florida Power and Light Company ("FPL") is FPL Group, Inc. FPL has no nonwholly owned subsidiaries.

3. Respondent Duke Energy Corporation, formerly known as Duke Power Company has no parent and the following nonwholly owned subsidiaries: Flo Trend Systems, Inc. and TEPPCO Partners, L.P.

4. Respondent Vermont Yankee Nuclear Power Corporation has no parent or nonwholly owned subsidiaries.

5. Respondent Niagara Mohawk Power Corporation has no parent and one nonwholly owned subsidiary, Canadian Niagara Power Company, Ltd.

6. The parent company of respondents GPU Nuclear, Inc., Jersey Central Power & Light Company, Metropolitan Edison Company and Pennsylvania Electric Company is GPU, Inc. These respondents have no nonwholly owned subsidiaries.

7. The parent company of respondent Wisconsin Public Service Corporation is WPS Resources Corporation. Wisconsin Public Service Corporation has no nonwholly owned subsidiaries.

8. The parent company of respondent Union Electric Company, d/b/a AmerenUE, is Ameren Corporation. Union Electric Company has one nonwholly owned subsidiary, Electric Energy, Inc.

9. The parent company of respondent Detroit Edison Company is DTE Energy Company. Detroit Edison Company has no nonwholly owned subsidiaries.

10. The parent company of respondent Public Service Electric and Gas Company is Public Service Enterprise Group Incorporated. Public Service Electric and Gas Company has the following nonwholly owned subsidiaries: Enterprise Diversified Holdings Incorporated and PSE&G Fuel Corporation.

11. The parent company of respondent Florida Power Corporation is Florida Progress Corporation. Florida Power Corporation has one nonwholly owned subsidiary, Florida Capital Holdings, Inc.

12. The parent company of respondent Kansas Gas and Electric Company is Western Resources, Inc. Kansas Gas and Electric Company has no nonwholly owned subsidiaries.

13. Respondent Wolf Creek Nuclear Operating Corporation has no parent or nonwholly owned subsidiaries.

14. Respondent Kansas City Power & Light Company has no parent or nonwholly owned subsidiaries.

15. Respondent Kansas Electric Power Cooperative, Inc. has no parent or nonwholly owned subsidiaries.

16. The parent company of respondent Indiana Michigan Power Company is American Electric Power Company, Inc. Indiana Michigan Power Company has no nonwholly owned subsidiaries.

17. Respondent PECO Energy Company has no parent or nonwholly owned subsidiaries.

18. The parent company of respondent Virginia Electric and Power Company is Dominion Resources, Inc. Virginia Electric and Power Company has no nonwholly owned subsidiaries.

19. Respondent Baltimore Gas and Electric Company has no parent or nonwholly owned subsidiaries.

20. Respondent FirstEnergy Corp. (successor by merger to Centerior Energy Corporation) has no parent or nonwholly owned subsidiaries.

21. The parent company of respondent Duquesne Light Company is DQE, Inc. Duquesne Light Company has one nonwholly owned subsidiary, Duquesne Light Capital Ltd. Partnership.

22. The parent company of respondent MidAmerican Energy Company is MidAmerican Energy Holdings Company. MidAmerican Energy Company has no nonwholly owned subsidiaries.

23. The parent company of respondent Pennsylvania Power & Light Company is PP&L Resources, Inc. Pennsylvania Power & Light Company has no nonwholly owned subsidiaries.

24. The parent company of respondent Entergy Operations, Inc. is Entergy Corporation. Entergy Operations, Inc. has no nonwholly owned subsidiaries.

25. The parent company of respondent Texas Utilities Electric Company is Texas Utilities Company.

Texas Utilities Electric Company has no nonwholly owned subsidiaries.

26. Respondent Carolina Power & Light Company has no parent or nonwholly owned subsidiaries.

27. The parent company of respondent Commonwealth Edison Company is Unicom Corporation. Commonwealth Edison Company has no nonwholly owned subsidiaries.

28. Respondent Boston Edison Company has no parent or nonwholly owned subsidiaries.

29. The parent company of respondent Southern Nuclear Operating Company is the Southern Company. Southern Nuclear Operating Company has no nonwholly owned subsidiaries.

30. The parent company of respondent Wisconsin Electric Power Company is Wisconsin Energy Corporation. Wisconsin Electric Power Company has no nonwholly owned subsidiaries.

31. Respondent Omaha Public Power District has no parent or nonwholly owned subsidiaries.

32. Respondent Nebraska Public Power District has no parent or nonwholly owned subsidiaries.

33. Respondent Washington Public Power Supply System has no parent or nonwholly owned subsidiaries.

34. The parent company of respondent South Carolina Electric & Gas Company is SCANA Corporation. South Carolina Electric & Gas Company has no nonwholly owned subsidiaries.

35. The parent company of respondent IES Utilities Inc. is Interstate Energy Corporation. IES Utilities Inc. has no nonwholly owned subsidiaries.

36. Respondent Central Iowa Power Cooperative has no parent or nonwholly owned subsidiaries.

37. Respondent Corn Belt Power Cooperative has no parent or nonwholly owned subsidiaries.

38. The parent company of respondent Southern California Edison Company is Edison International. Southern California Edison Company has no nonwholly owned subsidiaries.

39. Respondent Dairyland Power Cooperative has no parent or nonwholly owned subsidiaries.

40. The parent company of respondents Northeast Utilities Service Company and North Atlantic Energy Service Corporation is Northeast Utilities. Northeast Utilities Service Company and North Atlantic Energy Service Corporation have no nonwholly owned subsidiaries.

41. The parent company of respondent Consolidated Edison Company of New York, Inc. ("Con Ed") is Consolidated Edison, Inc. Con Ed has one nonwholly owned subsidiary, Honeoye Storage Corporation.

42. The parent company of respondent Illinois Power Company is Illinova Corporation. Illinois Power Company has one nonwholly owned subsidiary, Illinois Power Fuel Company.

43. Respondent Rochester Gas and Electric Corporation has no parent or nonwholly owned subsidiaries.

44. The parent company of Respondent Pacific Gas and Electric Company is PG&E Corporation. Pacific Gas and Electric Company has one nonwholly owned subsidiary, Standard Pacific Gas Line Incorporated.

45. Respondent Maine Yankee Atomic Power Company has no nonwholly owned subsidiaries and the following parents: Central Maine Power

Company, Northeast Utilities, New England Power Company, Bangor HydroElectric Company, Maine Public Service Company, Cambridge Electric Light Company, Montaup Electric Company, and Central Vermont Public Service Corporation.

46. Respondent Connecticut Yankee Atomic Power Company has no nonwholly owned subsidiaries and the following parents: Northeast Utilities, New England Power Company, BEC Energy, The United Illuminating Company, Central Maine Power Company, Cambridge Electric Light Company, Montaup Electric Company, and Central Vermont Public Service Corporation.

47. Respondent Yankee Atomic Electric Company has no nonwholly owned subsidiaries and the following parents: New England Power Company, Northeast Utilities, BEC Energy, Central Maine Power Company, Montaup Electric Company, Central Vermont Public Service Corporation, Commonwealth Electric Company, and Cambridge Electric Light Company.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
RULE 29.6 LISTING	ii
TABLE OF AUTHORITIES	xi
STATEMENT OF THE CASE	1
A. DOE's Attempt to Evade Its Unconditional Obligation	2
B. The *Indiana Michigan* Decision	3
C. DOE's Disregard of the *Indiana Michigan* Mandate	4
D. The Enforcement Proceedings Below	5
ARGUMENT	7
I. THE GOVERNMENT'S PETITION CHALLENGING THE COURT OF APPEALS' ROUTINE AND PROPER EXERCISE OF ITS AUTHORITY TO ENFORCE ITS PRIOR, FINAL JUDGMENT DOES NOT PRESENT AN ISSUE WORTHY OF THIS COURT'S REVIEW AND IS UNTIMELY	7
A. The Court's Exercise of Its Authority To Enforce Its Prior, Unchallenged Mandate Was Appropriate and Does Not Present an Issue Worthy of Review	8
B. The Government's Petition is an Untimely and Improper Collateral Attack on the *Indiana Michigan* Decision	12
II. THE TUCKER ACT QUESTION PRESENTED BY THE GOVERNMENT IS INSUBSTANTIAL	15
A. The Court of Appeals' Enforcement of Its Prior Mandate Issued Pursuant to Its NWPA Jurisdiction Does Not Implicate the Tucker Act	15

TABLE OF CONTENTS—Continued

Page

B. The Tucker Act Issue Presented by the Government is Not Ripe for Review 19

III. THE PETITION DOES NOT PRESENT A QUESTION THAT WOULD RESOLVE THE PROBLEMS WITH THE NATION'S SNF DISPOSAL PROGRAM 21

CONCLUSION 22

TABLE OF AUTHORITIES

Cases: Page

Bowen v. Massachusetts, 487 U.S. 879 (1988) 15, 16
Chicot County Drainage District v. Baxter State Bank, 308 U.S. 371 (1940) 13
Commonwealth Edison Co. v. Department of Energy, 877 F.2d 1042 (D.C. Cir. 1989) 11
Eastern Enterprises v. Apfel, 118 S. Ct. 2131 (1998) 16
Functional Music, Inc. v. FCC, 274 F.2d 543 (D.C. Cir. 1958) 12
Graceba Total Communications, Inc. v. FCC, 115 F.3d 1038 (D.C. Cir. 1997) 12
Indiana Michigan Power Co. v. Department of Energy, 88 F.3d 1272 (D.C. Cir. 1996) 1
Insurance Corp. of Ireland v. Campagnie de Bauxites de Guinee, 456 U.S. 674 (1982) 13
Jackson v. Irving Trust Co., 311 U.S. 494 (1941) .. 13
MCI Telecommunications Corp. v. FCC, 765 F.2d 1186 (D.C. Cir. 1985) 12
Megapulse, Inc. v. Lewis, 672 F.2d 959 (D.C. Cir. 1982) 15, 17, 18
Northern States Power Co. v. Department of Energy, 128 F.3d 754 (D.C. Cir. 1997) 6
Office of Consumers' Counsel v. FERC, 826 F.2d 1136 (D.C. Cir. 1987) 8
Potomac Electric Power Co. v. ICC, 702 F.2d 1026 (D.C. Cir.), *supplemental op.*, 705 F.2d 1343 (D.C. Cir. 1983) 8
RCA Global Communications, Inc. v. FCC, 758 F.2d 722 (D.C. Cir. 1985) 12
Sharp v. Weinberger, 798 F.2d 1521 (D.C. Cir. 1986) 15
Tidewater Oil Co. v. United States, 409 U.S. 151 (1972) 21
Transohio Savings Bank v. Director, OTS, 967 F.2d 598 (D.C. Cir. 1992) 15, 17
United States v. New York Telephone Co., 434 U.S. 159 (1977) 8
United States v. United States District Court, 334 U.S. 258 (1948) 8

TABLE OF AUTHORITIES—Continued

	Page
United States v. USF&G, 309 U.S. 506 (1940)	13
United States v. Winstar Corp., 518 U.S. 839 (1996)	22
Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 937 (1952)	21
Statutes, Rules and Regulations:	
10 C.F.R. pt. 961.11, Arts. II and VIII (1998)	2
5 U.S.C. § 702 (1994)	13
28 U.S.C. § 2101(c) (1994)	12
Nuclear Waste Policy Act of 1982	
Section 111, 42 U.S.C. § 10131 (1994)	2
Section 119(a), 42 U.S.C. § 10139(a) (1994)	3, 17
Section 119(c), 42 U.S.C. § 10139(c) (1994)	11
Section 302(a), 42 U.S.C. § 10222(a) (1994)	2
Section 302(a)(5)(B), 42 U.S.C. § 10222(a)(5)(B) (1994)	1, 2
Tucker Act, 28 U.S.C. § 1491(a)(1) (1994 & Supp. II 1996)	15
Supreme Court Rule 29.6	ii
Miscellaneous:	
60 Fed. Reg. 21,793 (1995)	3
61 Fed. Reg. 25,092 (1996)	5
DOE/EIS-0203-F, Department of Energy Programmatic Spent Nuclear Fuel Management and Idaho National Engineering Laboratory Environmental Restoration and Waste Management Programs Final Environmental Impact Statement (Apr. 1995)	5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-384

UNITED STATES OF AMERICA, ET AL.,
Petitioners,

v.

NORTHERN STATES POWER COMPANY, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF IN OPPOSITION FOR THE UTILITY RESPONDENTS

STATEMENT OF THE CASE

The present case is a routine enforcement proceeding resulting from the Department of Energy's ("DOE") complete disregard of the court of appeals' decision in *Indiana Michigan Power Co. v. Department of Energy*, 88 F.3d 1272 (D.C. Cir. 1996). Pet. App. 27a-38a. In that case, the court of appeals held unequivocally that Section 302(a)(5)(B) of the Nuclear Waste Policy Act of 1982, as amended, 42 U.S.C. § 10222(a)(5)(B) (1994) ("NWPA") imposed on DOE an unconditional obligation to dispose of commercial utilities' spent nuclear fuel ("SNF") beginning no later than January 31, 1998, and remanded the matter to DOE to take action consistent with its unconditional obligation. Pet. App. 38a. DOE did not seek review by this Court. In the present

action, the court of appeals did nothing more than enforce its prior mandate by exercising its mandamus power—in what the government concedes to be limited fashion—to preclude DOE from attempting to turn the unconditional obligation required by the NWPA into a contingent one through the misuse of the Standard Contract for Disposal of Spent Nuclear Fuel and/or High-Level Radioactive Waste ("Standard Contract").

The court's compliance order raises no jurisdictional issues under the Tucker Act, much less an issue worthy of review by this Court. Rather, the ostensible jurisdictional question presented by the government's petition is a transparent subterfuge by which the government seeks, one case and two years too late, to obtain review of the underlying decision in *Indiana Michigan* that DOE has an unconditional obligation to begin disposing of SNF not later than January 31, 1998. The *Indiana Michigan* decision was clearly correct and in any event is binding on the government. DOE's collateral attack on the *Indiana Michigan* decision—an attempt to accomplish indirectly what it failed to accomplish directly—should be seen for what it is and rejected.

A. DOE's Attempt to Evade Its Unconditional Obligation

Congress enacted the NWPA to codify the federal government's longstanding commitment to accept responsibility and provide for the timely disposal of commercial SNF. 42 U.S.C. § 10131 (1994). In return for the payment of billions of dollars in fees by nuclear utilities and other generators or owners of domestic commercial SNF, DOE was required to begin disposing of SNF by January 31, 1998. 42 U.S.C. § 10222(a)(5)(B). Pursuant to Section 302(a) of the NWPA, 42 U.S.C. § 10222(a) (1994), this essential quid pro quo is embodied in the Standard Contract. 10 C.F.R. pt. 961.11, Arts. II and VIII (1998).

DOE failed to meet most of the early milestones established by the NWPA (except for those relating to collecting fees from utilities). By 1995, the SNF program had fallen many years behind schedule. In May 1995, DOE advised the public, in its Final Interpretation of Nuclear Waste Acceptance Issues ("Final Interpretation"), that it "has become apparent that neither a repository nor an interim storage facility constructed under the Act will be available by 1998" and that it would not begin disposing of SNF until 2010 at the earliest. 60 Fed. Reg. 21,793, 21,793-21,794 (1995). The Final Interpretation also stated DOE's conclusion that its obligation to meet the January 1998 deadline imposed by the NWPA and the Standard Contract was conditioned on the existence of a final repository or interim storage facility. *Id.* at 21,794-95.

B. The *Indiana Michigan* Decision

A group of nuclear utilities and a separate group of States and state utility commissions filed petitions in the D.C. Circuit, pursuant to Section 119(a) of the NWPA, 42 U.S.C. § 10139(a) (1994), for review of DOE's Final Interpretation. In *Indiana Michigan*, the court of appeals unequivocally rejected DOE's position, holding that "[u]nder the plain language of the statute, the utilities anticipated paying fees 'in return for [which] the Secretary [of DOE]' had a commensurate duty . . . to begin disposing of the high-level radioactive waste or SNF by a date certain." Pet. App. 36a (first alteration in original). Therefore, the court held, DOE's obligation under NWPA § 302(a)(5)(B) to commence disposing of SNF no later than January 31, 1998, was "without qualification or condition." *Id.* The court explained that DOE's contrary interpretation "not only blue-pencils out the phrase 'not later than January 31, 1998,' but destroys the quid pro quo created by Congress." *Id.* The court rejected DOE's contention that "the [utilities'] payment of fees was for nothing." *Id.*

Although the court stated that it was then premature to determine the appropriate remedy because DOE had "not yet defaulted upon either its statutory or contractual obligation," the court concluded that "section 302(a)(5)(B) creates an obligation in DOE, reciprocal to the utilities' obligation to pay, to start disposing of the SNF no later than January 31, 1998." Pet. App. 37a-38a. The court remanded the case to DOE for further proceedings consistent with its opinion. *Id.* at 38a.

C. DOE's Disregard of the *Indiana Michigan* Mandate

As the court below observed, "DOE neither sought rehearing of [*Indiana Michigan*] nor petitioned the Supreme Court for further review." Pet. App. 5a. Instead, DOE simply ignored the decision. The D.C. Circuit succinctly described DOE's response as follows:

> After issuing our decision in *Indiana Michigan,* we would have expected that the Department would proceed as if it had just been told that it had an unconditional obligation to take the nuclear materials by the January 31, 1998, deadline. Not so. Quite to the contrary, the Department informed the utilities and the states that it would be unable to comply with the statutory deadline that this court had just reaffirmed. In late 1996, the utilities and the states initiated discussions with DOE and asked about the procedure and schedule that the Department would follow to comply with the court's decision. DOE responded to the utilities by announcing that it "will be unable to begin acceptance of spent nuclear fuel for disposal in a repository or interim storage facility by January 31, 1998." . . . The Department recognized that the delay would affect "large number[s]" of contract holders, but nonetheless expressed "uncertainty as to when DOE will be able to begin spent fuel acceptance." . . . The letter ended

> by cordially inviting "the views of all contract holders on how the delay can best be accommodated."

Id. (citations omitted).[1]

D. The Enforcement Proceedings Below

In response to DOE's recalcitrance, on January 31, 1997, the Utility Respondents, States and state commissions filed petitions in the court seeking the exercise of the court's mandamus enforcement jurisdiction to compel DOE's compliance with its unconditional NWPA obligation and with the court's prior mandate in *Indiana Michigan*. During the pendency of those proceedings, and despite the fact that no utility had sought any relief from DOE under the Standard Contract, on June 3, 1997, DOE unilaterally issued a "preliminary determination" that its failure to meet the January 31, 1998 deadline was an "unavoidable delay" within the meaning of Article IX.A of the Standard Contract. Pet. App. 6a. DOE therefore asserted that it had no obligation to pay for the damages suffered by the utilities as a result of DOE's default. *Id.* The "preliminary determination" focused on DOE's excuses for failing to establish the geologic reposi-

---

[1] DOE's failure to make any effort to comply with the court's mandate was not based on any lack of ability to transport or store SNF. During the past four decades, DOE and its predecessor agencies have transported, received, stored, and reprocessed more than 100,000 metric tons of civilian and military SNF, and DOE continues to accept civilian-generated SNF from nations around the world. *See* 61 Fed. Reg. 25,092, 25,095-96 (1996); DOE/EIS-0203-F, Department of Energy Programmatic Spent Nuclear Fuel Management and Idaho National Engineering Laboratory Environmental Restoration and Waste Management Programs Final Environmental Impact Statement (Apr. 1995), excerpts of which were included as attachment 11 to the Utility Petitioners' Petition for a Writ of Mandamas filed in No. 97-1064. Consistent with these facts, at oral argument in the case below the government's counsel admitted that DOE was physically able to meet the statutory deadline. Transcript of Oral Argument dated Sept. 25, 1997, at 29-30, *Northern States Power Co. v. Department of Energy*, (D.C. Cir.) (No. 97-1064).

tory called for by the NWPA, even though the court of appeals in *Indiana Michigan* had specifically rejected DOE's position that its obligation to begin disposing of SNF by January 31, 1998, was contingent upon the existence of such a repository. *Id.* at 12a-13a.

On November 14, 1997, the court of appeals granted what the government characterizes as "limited mandamus relief." Pet. at 11; *see Northern States Power Co. v. Department of Energy*, 128 F.3d 754 (D.C. Cir. 1997); Pet. App. 1a-4a. The court strongly reaffirmed its decision in *Indiana Michigan*, holding that "the NWPA requires DOE, 'in return for the payment of fees' to begin disposing of the materials 'not later than January 31, 1998.'" *Id.* at 8a. The court observed that, although the utilities had fulfilled their part of the statutory bargain, DOE had simply brushed aside its corresponding duty. *Id.* Accordingly, the court issued a narrowly tailored writ of mandamus "precluding DOE from excusing its own delay on the grounds that it has not yet prepared a permanent repository or interim storage facility." *Id.* at 14a. The court concluded that such an enforcement order was necessary in light of "DOE's repeated attempts to excuse its delay" on such grounds, notwithstanding the court's rejection of those arguments in *Indiana Michigan*. *Id.* at 13a. As the court explained, "DOE cannot now render its obligation contingent, and free itself of the costs caused by its delay, by advancing the same failed position that we rejected before." *Id.*

DOE petitioned for rehearing, contending that under the Tucker Act, 28 U.S.C. § 1491, the court of appeals had no jurisdiction to issue an order regarding the proper application of the Unavoidable Delays clause of the Standard Contract. The court denied DOE's petition, pointing out that it had not ruled on a contract claim but rather on a statutory issue:

> [W]e merely prohibited the DOE from implementing an interpretation [of the Unavoidable Delays clause that would place it in violation of its duty under the NWPA to assume an unconditional obligation to begin disposal by January 31, 1998. *The statutory duty to include an unconditional obligation in the contract is independent of any rights under the contract.* The Tucker Act does not prevent us from exercising jurisdiction over an action to enforce compliance with the NWPA.

Pet. App. 19a (emphasis added).

Pursuant to the *Northern States* decision, ten utilities filed breach of contract actions against the government in the Court of Federal Claims, seeking money damages for DOE's breach of its NWPA-mandated unconditional obligation in the Standard Contract. One utility has filed a request with DOE for an equitable adjustment pursuant to the Avoidable Delays clause of the Standard Contract, Article IX.B. Five utilities have filed a new action in the D.C. Circuit, pursuant to that court's "original and exclusive jurisdiction" under Section 119(a) of the NWPA, 42 U.S.C. § 10139(a), alleging constitutional, statutory, and contractual violations and seeking injunctive relief and damages.

ARGUMENT

I. THE GOVERNMENT'S PETITION CHALLENGING THE COURT OF APPEALS' ROUTINE AND PROPER EXERCISE OF ITS AUTHORITY TO ENFORCE ITS PRIOR, FINAL JUDGMENT DOES NOT PRESENT AN ISSUE WORTHY OF THIS COURT'S REVIEW AND IS UNTIMELY

The decision below has no significance independent of *Indiana Michigan*. The *Indiana Michigan* decision resolved the substantive question of whether the NWPA required DOE to undertake an unconditional obligation to dispose of SNF beginning no later than January 31, 1998, stating unequivocally that DOE did have such an

obligation. In the present proceedings, the appellate panel merely determined that its earlier decision in *Indiana Michigan* precluded DOE from treating its failure to meet the January 1998 deadline as unavoidable, and selected an appropriate mechanism for enforcing DOE's compliance with that mandate. There is nothing extraordinary in that enforcement process that requires this Court's review. Moreover, the government's attempt to attack the final, unappealed decision in *Indiana Michigan* is untimely.

A. The Court's Exercise of Its Authority To Enforce Its Prior, Unchallenged Mandate Was Appropriate and Does Not Present an Issue Warranting Review

There is nothing unusual or improper about the court of appeals' exercise of its inherent jurisdiction to enforce its prior mandate in *Indiana Michigan*. *See, e.g., United States v. New York Tel. Co.*, 434 U.S. 159, 172-73 (1977) ("This Court has repeatedly recognized the power of a federal court to issue such commands under the All Writs Act as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained . . . ."); *United States v. United States Dist. Court*, 334 U.S. 258, 264 (1948); *Office of Consumers' Counsel v. FERC*, 826 F.2d 1136, 1140 (D.C. Cir. 1987); *Potomac Elec. Power Co. v. ICC*, 702 F.2d 1026, 1032 (D.C. Cir.), *supplemental op.*, 705 F.2d 1343 (D.C. Cir. 1983). The government's contention that the D.C. Circuit had no jurisdiction to enforce its prior mandate because the Tucker Act gives the Court of Federal Claims exclusive jurisdiction over claims arising under the Standard Contract simply begs the question. As described below, neither *Indiana Michigan* nor *Northern States* involved a damages claim arising under the Standard Contract. Rather, these cases interpreted and enforced DOE's obligation under the NWPA to assume an unconditional obligation to dispose of SNF. The limited mandamus relief issued by the D.C. Circuit in this case precluded DOE

from misusing a provision of the Standard Contract in derogation of that statutory obligation.[2]

The government's attempt to cast doubt on the court's exercise of its jurisdiction in *Indiana Michigan* (Pet. at 17 n.9) should be rejected. Contrary to the government's argument, the court of appeals has never held that DOE's unconditional obligation is solely contractual. Rather, in the case below the court reiterated in the strongest terms that "[t]he contractual obligations created consistently with the *statutory contemplation* leave no room for DOE to argue that it does not have a clear duty to take the SNF . . . by the deadline imposed by Congress." Pet. App. 9a (emphasis added); *see also id.* at 13a ("We held in *Indiana Michigan* that the NWPA imposes an unconditional duty on DOE to take the materials by 1998."). The government's reliance on the court's May 5, 1998 Order denying rehearing is misplaced. The court simply noted that because the NWPA required DOE to include its unconditional obligation in the Standard Contract, DOE could not be ordered to perform the obligation but rather had the choice of performing or of paying the additional costs incurred by Standard Contract holders as a result of its failure to perform. *Id.* at 18a. The court made

---

[2] The government inexplicably cites its pending petition for a writ of certiorari in *FCC v. Iowa Utilities Board*, 97-1519, in support of its attack on the court's exercise of mandamus authority. Pet. at 19 n.10. That case involves an entirely different statutory scheme (the Telecommunications Act of 1996), and disposition of the jurisdictional question presented for review in *Iowa Utilities Board* would shed no light on the issue presented here regarding the effect of the Tucker Act on the scope of the court's jurisdiction under the NWPA. Moreover, when the government filed the petition in question, this Court had already granted review of the Eighth Circuit's underlying decision on which the subsequent mandamus order was based. Here, by contrast, the government neither sought nor obtained review of the underlying decision in *Indiana Michigan*, which has long since become final and binding. Accordingly, there is no question in this case about the propriety of the mandate that the court of appeals enforced in the decision below.

clear that DOE's attempt to interpret the Standard Contract "as imposing only a contingent disposal obligation . . . would place the DOE in violation of its *statutory* duties under the [NWPA], which required it to undertake an unconditional obligation." *Id.* at 17a (emphasis added); *see also id.* at 18a ("*Northern States* describes the nature of the DOE's obligation, which was created by the NWPA and undertaken by the DOE under the Standard Contract"). In any event, the court's exercise of its jurisdiction in *Indiana Michigan* is now beyond challenge and establishes the validity of the mandamus order issued in a case that had come within the court's jurisdiction the year before. Pet. at 18.

Similarly, the government's challenge to the merits of the court of appeals' decision below (Pet. at 20-22) not only is irrelevant to the question of whether the court had jurisdiction, which is the sole question the government presents for review, but depends again on the government's mischaracterization of the decision as one involving a purely contractual claim. The government takes issue with the court's "apparent premise" that "DOE's failure to fulfill a contractual obligation *necessarily* requires the payment of damages for any losses incurred as a result of the breach." Pet. at 20 (emphasis in original). As has been seen, however, the court did not rule that DOE failed to fulfill a mere contractual obligation. Rather, the court held that DOE failed to fulfill a *statutory* duty under the NWPA, "which required [DOE] to undertake an unconditional obligation" in the Standard Contract. Pet. App. 17a. As the court emphasized in rejecting DOE's rehearing petition, "The statutory duty to include an unconditional obligation in the contract is independent of any rights under the contract." *Id.* at 19a. Thus, the court properly concluded that DOE could not abrogate its statutorily-mandated unconditional obligation by relying on a contractual provision to excuse itself both from

performing its obligation and from compensating the utilities for damages resulting from its failure to perform.[3]

Because the court of appeals' ruling so clearly involves a statutory and not just a contractual claim, the government attempts to preserve its tenuous jurisdictional argument by serving up an "alternative explanation" of the decision as a holding that the Standard Contract's Unavoidable Delays clause is on its face inconsistent with the NWPA. Pet. at 23. Moreover, the government's "alternative argument" that the D.C. Circuit lacked jurisdiction because the utilities failed to file a petition for review within 180 days of the 1983 promulgation of the Standard Contract, as required by NWPA § 119(c), 42 U.S.C. § 10139(c) (1994), is without merit.

The Utility Respondents did not contend, and the court of appeals did not find, that the Unavoidable Delays clause was statutorily invalid on its face. Rather, the court of appeals held that the Unavoidable Delays clause, "insofar *as it is applied* to DOE's failure to perform by 1998, is inconsistent with DOE's statutory obligation to assume an unconditional duty." Pet. App. 14a (emphasis added). In so holding, the court of appeals did not purport to interpret a contractual provision, but rather determined that any interpretation of the Unavoidable Delays clause by DOE to excuse its failure to meet the January 31, 1998 deadline is precluded by the NWPA. There can be no serious question that the court had jurisdiction to interpret the *statute* as well as its prior ruling in *Indiana Michigan* in order to make that determination.[4]

---

[3] Notwithstanding the government's hyperbolic arguments (Pet. at 20-21 and n.12), the logic of the court of appeals' ruling neither nullifies the Unavoidable Delays provision of the Standard Contract nor exposes DOE to damages for truly unavoidable delays in particular shipments of SNF once DOE actually commences the disposal program. The essence of the court's decision is that DOE's failure to begin the program by the congressionally-mandated deadline cannot be fully excused under any circumstances as "unavoidable."

[4] The government concedes that in *Commonwealth Edison Co. v. Department of Energy*, 877 F.2d 1042 (D.C. Cir. 1989), it endorsed

Moreover, the government ignores the fundamental principle that a party aggrieved by the application of an agency rule may challenge that application even though the statutory time limit for judicial review of the promulgation of the rule has passed. *See, e.g., Graceba Total Communications, Inc. v. FCC*, 115 F.3d 1038, 1040-41 (D.C. Cir. 1997); *MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186, 1189-91 (D.C. Cir. 1985); *RCA Global Communications, Inc. v. FCC*, 758 F.2d 722, 730-31 (D.C. Cir. 1985); *Functional Music, Inc. v. FCC*, 274 F.2d 543 (D.C. Cir. 1958). This principle applies with particular force here. It is absurd for the government to suggest that in 1983 the utilities could and should have foreseen that fifteen years later DOE not only would default on its statutorily-imposed deadline, but also would attempt to avoid the consequences of its default by misapplying the Standard Contract to excuse its programmatic failure. *See RCA Global Communications*, 758 F.2d at 731.

B. The Government's Petition is an Untimely and Improper Collateral Attack on the *Indiana Michigan* Decision

Having failed to pursue further review in *Indiana Michigan*, the government is statutorily precluded from challenging either the D.C. Circuit's exercise of jurisdiction in that case (which provides the basis for the court's exercise of its All Writs Act power) or the panel's substantive rulings. 28 U.S.C. § 2101(c) (1994). The government may not avoid the time limits imposed by 28 U.S.C. § 2101(c) by collaterally attacking the D.C. Circuit's holding in *Indiana Michigan* under the guise of

---

the court of appeals' jurisdiction to rule on a challenge to DOE's interpretation of a Standard Contract provision, but now claims that this was a mistake. Pet. at 23 n.13. In fact, the *Commonwealth Edison* decision was clearly correct in this respect, and the government's present attempt to reverse field is both baseless and nine years too late.

cnallenging the court of appeals' authority to compel compliance with its prior mandate. The court's assumption of jurisdiction in *Indiana Michigan* to construe DOE's obligations under the NWPA, from which the government made no attempt to seek review, bars the government as a matter of *res judicata* from challenging the court's subsequent exercise of its enforcement jurisdiction in that respect. *See, e.g., Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 376-78 (1940); *Insurance Corp. of Ireland v. Compagnie de Bauxites de Guinee*, 456 U.S. 694, 702 n.9 (1982) ("A party that has had an opportunity to litigate the question of subject matter jurisdiction may not reopen that question in a collateral attack upon an adverse judgment.").[5]

A collateral attack, however, is precisely what the government is attempting to achieve. Indeed, the government concedes that "[t]he Court's decision to grant mandamus relief . . . was based on . . . its conclusion, drawn from the *Indiana Michigan* opinion . . . ." Pet. at 21 n.12. In order to obfuscate the fact that its true target is *Indiana Michigan*, the government states the "Question Presented" to this Court as whether the court's limited mandamus order enforcing its decision in *Indiana Michigan* impermissibly intrudes upon the exclusive Tucker Act jurisdiction of the Court of Federal Claims. But even the government's formulation of the question presented implicitly challenges the holding in *Indiana Michigan*. Application

---

[5] The one exceedingly narrow exception to this basic rule of judicial finality is "where the issue is the waiver of immunity." *United States v. USF&G*, 309 U.S. 506, 514 (1940). In this case, there can be no legitmate question that the government clearly has waived its immunity from suits relating to DOE's failure to comply with the NWPA. *See* 5 U.S.C. § 702 (1994). The government disputes only the proper forum in which the particular challenge should be heard. The courts have consistently declined to extend *USF&G* beyond its facts. *See, e.g., Jackson v. Irving Trust Co.*, 311 U.S. 494, 499-500 (1941) (declining to extend *USF&G* to permit collateral attacks on jurisdictional facts).

of the Unavoidable Delays clause to a programmatic failure to begin accepting SNF by the statutory deadline, regardless of the justification for its application, expressly relieves the government of the "unconditional duty on DOE to take the materials by 1998" that the court in *Indiana Michigan* found to exist. Pet. App. 13a. That this is the government's true intent is revealed in its expression of "substantial doubt" as to whether the court of appeals properly exercised its NWPA jurisdiction in *Indiana Michigan*. Pet. at 17 n.9.

The government, for obvious reasons, does not directly present as a question to be decided by this Court the necessary preliminary issue of whether the court below misconstrued the meaning of its own prior final decision. To do so would plainly involve nothing more than a collateral attack on the merits of the final judgment in *Indiana Michigan*. Furthermore, even had the government's petition presented the question of the D.C. Circuit's construction of its own mandate, that question would be unworthy of review by this Court. The government itself has made that point in its opposition to the petition for a writ of certiorari filed by the States and state utility commissions seeking review of the decision below on the ground that the court did not go far enough in enforcing DOE's statutory obligations:

> Any inconsistency between that holding [in the court's May 5, 1998 Order] and some of the reasoning in prior opinions issued by the same panel of the same court of appeals does not warrant review by this Court.

Brief for Respondents in Opposition dated Oct. 1998, at 13, *Michigan, et al. v. Department of Energy, et al.* (S. Ct.) (No. 98-225). The government's position on the States' petition applies with at least equal force to the government's own petition here and demonstrates that the

government has not raised an issue worthy of further review.[6]

II. THE TUCKER ACT QUESTION PRESENTED BY THE GOVERNMENT IS INSUBSTANTIAL

A. The Court of Appeals' Enforcement of Its Prior Mandate Issued Pursuant to Its NWPA Jurisdiction Does Not Implicate the Tucker Act

Even if the government's arguments are not time-barred, they should be rejected. The court of appeals correctly applied the well-established rule that the Tucker Act does not prohibit the federal district courts or regional courts of appeals from examining and interpreting government contracts, or even from granting relief that may affect rights under government contracts, in the course of deciding statutory and constitutional claims otherwise within their jurisdiction. *See Bowen v. Massachusetts*, 487 U.S. 879 (1988); *Transohio Savings Bank v. Director, OTS*, 967 F.2d 598, 609-11 (D.C. Cir. 1992); *Sharp v. Weinberger*, 798 F.2d 1521, 1522 (D.C. Cir. 1986); *Megapulse, Inc. v. Lewis*, 672 F.2d 959, 968 (D.C. Cir. 1982) (the Court of Federal Claims "certainly has no corner on the power to consider contract-related issues arising in other actions"). The court's routine application of that rule to the facts of this case does not present an issue warranting this Court's attention.

The Tucker Act waives the government's sovereign immunity to be sued in the Court of Federal Claims for money damages for claims arising under the Constitution, statute, or contract. 28 U.S.C. § 1491(a)(1) (1994 &

---

[6] The States' petition raises different issues than the question presented by the government, including whether the court below should have ordered DOE to begin disposing of SNF by the January 31, 1998 deadline. Consequently, if the Court should choose to grant the States' petition, there is no corresponding reason to grant review of the technical and untimely jurisdictional issue that the government has raised in the present petition.

Supp. II 1996). In previous decisions, this Court has exhaustively addressed the interplay between the Tucker Act and the Administrative Procedure Act ("APA") and the availability of equitable relief in courts other than the Court of Federal Claims. *Eastern Enters. v. Apfel*, 118 S. Ct. 2131 (1998); *Bowen v. Massachusetts*, 487 U.S. 879 (1988). In particular, the Court in *Bowen* rejected an argument virtually identical to the government's position here. The government argued in *Bowen* that the federal district courts had no jurisdiction under the APA to review decisions by the Secretary of Health and Human Services denying Medicaid reimbursements to States, because the Tucker Act gave the Claims Court (now the Court of Federal Claims) exclusive jurisdiction over claims against the United States for monetary relief. *Id.* at 882-83. The Court, construing Sections 702 and 704 of the APA, concluded that complaints seeking injunctive and declaratory relief from agency action could not be characterized as actions for "money damages" even if enforcement of a statutory mandate involved an order for the payment of money (*id.* at 892-910), and therefore, "[t]he District Court's jurisdiction to award relief in these cases is not barred by the possibility that a purely monetary judgment may be entered in the Claims Court." *Id.* at 910.[7]

---

[7] The Court further explained that the assumption that the Court of Federal Claims' predecessor has exclusive jurisdiction over claims against the government for more than $10,000 is unsupported by the language of the Tucker Act:

> Rather, that court's jurisdiction is "exclusive" only to the extent that Congress has not granted any other court authority to hear the claims that may be decided by the Claims Court. If, however, § 702 of the APA is construed to authorize a district court to grant monetary relief—other than traditional "money damages"—as an incident to the complete relief that is appropriate in the review of agency action, the fact that the purely monetary aspects of the case could have been decided in

Here, Congress has unquestionably granted the court of appeals jurisdiction to review and enforce DOE's compliance with the NWPA.[8] Moreover, the relief ordered by the court of appeals here does not involve money. Therefore, as in *Bowen*, there is no basis for the government's contention that the Tucker Act either expressly or impliedly prevented the court of appeals from granting the Utility Respondents full relief on their statutory claims under the NWPA, even if that relief affects the parties' rights under the Standard Contract. There is no reason for the Court to revisit the question that it answered in *Bowen*.

In an attempt to create a jurisdictional issue where none exists, the government mischaracterizes both the scope of the Tucker Act as governing any issue involving a government contract and the nature of the decision below as one involving a contract claim. The very cases upon which the government relies, however, confirm that federal courts other than the Court of Federal Claims have jurisdiction over statutory and constitutional claims "even when the claims depend on the existence and terms of a contract with the government." *Transohio*, 967 F.2d at 610; *Megapulse*, 672 F.2d at 971 (rejecting the government's argument that "agency action may not be enjoined, even if in clear violation of a specific statute, simply because that same action might also amount to a breach of contract"). As the court of appeals explained in *Megapulse*:

> [S]o long as an action brought against the United States or an agency thereof is not one that should

---

> the Claims Court is not a sufficient reason to bar that aspect of the relief available in a district court.

487 U.S. at 910 n.48.

[8] Indeed, Congress has granted the courts of appeals original and *exclusive* jurisdiction "over any civil action" challenging an action or alleging a failure of DOE to act under the NWPA. 42 U.S.C. § 10139(a).

> be classified from the outset as a "contract action" for Tucker Act purposes, its remedies also are not contract-related, and the mere fact that an injunction would require the same governmental restraint that specific (non)performance might require in a contract setting is an insufficient basis to deny a district court the jurisdiction otherwise available and the remedial power otherwise appropriate.

Id.

The present action and *Indiana Michigan* are manifestly not "contract actions" within the scope of the Tucker Act. The Utility Respondents did not seek damages for breach of the Standard Contract, nor did they claim that DOE had violated their rights under the Standard Contract; instead, they filed a statutory enforcement action pursuant to the court of appeals' inherent jurisdiction to enforce its prior mandate and pursuant to its NWPA jurisdiction. The government, not the utilities, injected the Delays clause of the Standard Contract into the proceedings in an attempt to excuse DOE's failure to comply with its unconditional obligation and the court's mandate. *Megapulse,* 672 F.2d at 969. The fact that DOE's statutory obligation is reflected and incorporated in the Standard Contract did not transform this case into a contract action. On the contrary, because the Standard Contract itself is a creature of the NWPA, the court of appeals' consideration of DOE's attempt to apply the Unavoidable Delays clause in derogation of the statute was part and parcel of the court's NWPA and mandamus jurisdiction, just as the *Indiana Michigan* court's rejection of DOE's Final Interpretation of its statutory *and* contractual obligations was clearly within the court's NWPA jurisdiction.

The Utility Respondents likewise did not seek, and the court of appeals did not grant, any monetary or other relief under the Standard Contract. The court simply enjoined DOE from misapplying the Unavoidable Delays

provision of the Standard Contract in a way that contravened DOE's obligations under the NWPA. *See* Pet. App. 14a ("DOE has no authority to adopt a contract that violates the directives of Congress, just as it cannot implement interpretations of the contract that contravene this court's prior ruling."). Because the court of appeals clearly has jurisdiction to enforce DOE's statutory obligations, and because it is equally clear that the Court of Federal Claims has no such jurisdiction, the court of appeals acted well within its authority when it precluded DOE from violating the NWPA as construed in *Indiana Michigan*.

B. The Tucker Act Issue Presented by the Government is Not Ripe for Review

Even if there were some legitimate basis to suggest that the Tucker Act is implicated in the decision below—and there is not—review by this Court would not be appropriate at this time for three reasons. First, the question may well be rendered moot by the lower courts. As the government acknowledges, the utilities have already filed ten breach of contract actions in the Court of Federal Claims and have argued in those actions that the Delays clause is entirely inapplicable to their claims. Pet. at 26.[9] If the Court of Federal Claims and the Federal Circuit uphold the utilities' position on this issue, the jurisdictional question that the government attempts to raise here will be academic.

Second, the impact of the court of appeals' limited mandamus order on any contract claims against the government is far from clear. As the government recognizes (Pet. at 19 n.10), it is virtually certain that the Court of Federal

---

[9] *See, e.g.*, Connecticut Yankee's Opp. To Motion to Dismiss and Cross-Motion for Summary Judgment on Contract Liability, filed July 2, 1998, *Connecticut Yankee Atomic Power Co. v. United States* (Fed. Cl.) (No. 98-154C). Although the government's petition says that eleven utilities have filed breach of contract actions, the Utility Respondents are aware of only ten such lawsuits.

Claims would give great weight, if not preclusive effect, to the D.C. Circuit's decision in *Indiana Michigan*, and its construction of that decision in the present proceedings, wholly apart from the limited mandamus order entered in the latter case. Thus, the government is essentially asking this Court for an advisory ruling on a jurisdictional issue that will have no practical effect in the ongoing contract litigation between the utilities and DOE. And regardless of whether it can assert an "unavoidability" defense, the government no doubt will raise a wide array of other defenses to the utilities' breach of contract claims, as it has already begun to do by moving to dismiss several of the pending actions for alleged failure to exhaust administrative remedies. Those defenses will be resolved in due course by the Court of Federal Claims and Federal Circuit.

Third, five utilities have commenced an action against DOE in the D.C. Circuit for injunctive relief and damages pursuant to that court's original and exclusive jurisdiction under Section 119(a) of the NWPA, 42 U.S.C. § 10139(a), over "any civil action" challenging DOE's action or inaction under the NWPA. *Consolidated Edison Co. of New York, Inc., et al. v. Department of Energy* (D.C. Cir.) (No. 98-1358). The petitioners there allege that the specific grant of jurisdiction in NWPA § 119(a) gives the courts of appeals exclusive jurisdiction over all challenges to DOE action or inaction under the NWPA, including claims for damages under the Standard Contract promulgated pursuant to the NWPA, and that this specific grant of jurisdiction repeals the general grant of jurisdiction in the Tucker Act. The D.C. Circuit was not called upon in either *Indiana Michigan* or the case below to consider the effect of the NWPA's broad jurisdictional grant to the courts of appeals on the Court of Federal Claims' jurisdiction under the Tucker Act. The court of appeals' disposition of the jurisdictional issue in *Consolidated Edison*, however, will consider the interplay

between NWPA § 119(a) and the Tucker Act, essentially the same quetion that the government seeks to present here. There is no reason for this Court to act at least until the lower court has had the opportunity to consider and rule on that question. *Tidewater Oil Co. v. United States,* 409 U.S. 151, 186-87 (1972) (Stewart, Rehnquist, and Douglas, JJ. dissenting) (lower court's consideration prior to Supreme Court review is advantageous because it permits the Court to exercise certiorari power informed by reasoning of appellate court); *see also Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 937 (1952) (Burton and Frankfurter, JJ. concurring).

III. THE PETITION DOES NOT PRESENT A QUESTION THAT WOULD RESOLVE THE PROBLEMS WITH THE NATION'S SNF DISPOSAL PROGRAM

The government contends that review by this Court is necessary "to rectify the unwarranted disruptive effect of the decision below on efforts to achieve safe and equitable resolution of the difficult nationwide problem of nuclear waste disposal." Pet. at 27. That claim is not only wrong but disingenuous. The disruption of efforts to achieve a safe and equitable resolution of the difficult nationwide problem of nuclear waste disposal has nothing whatsoever to do with the decision below. Rather, it is entirely the result of DOE's ongoing refusal even to begin to dispose of SNF as required by the NWPA. Despite two clear judicial affirmations of the January 1998 deadline, DOE has not deviated from the course set in its 1995 Final Interpretation to refuse to make any effort to dispose of SNF until a final repository is operable, which DOE estimates will not be until 2010 at the earliest. In the meantime, the customers of the nation's nuclear utilities must continue to pay billions of dollars for nothing, and the utilities are left to grapple for more than another decade with the problem of SNF storage that Congress instructed DOE to assume sixteen years ago. Unfortunately, neither the decision

below nor the purported jurisdictional issue that the government presents for review will have any impact on that problem.

There is equally little merit to the government's suggestion that this Court should reverse the limited mandamus relief granted by the court of appeals to protect the government from substantial damage awards for DOE's breach of contract. The government is no different from any private party in its contractual dealings; it may not hide behind its sovereign authority to avoid paying damages for breach of its contracts. *United States v. Winstar Corp.*, 518 U.S. 839 (1996). In any event, the court of appeals did not require the government to pay any damages to the utilities. The court simply held that *Indiana Michigan* precludes DOE from violating its NWPA-mandated obligation through misuse of a Standard Contract term.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

Of Counsel:
JERRY STOUCK
ROBERT L. SHAPIRO
SPRIGGS & HOLLINGSWORTH
1350 I Street, N.W.
9th Floor
Washington, D.C. 20005

PETER BUSCEMI
MORGAN, LEWIS & BOCKIUS, LLP
1800 M Street, N.W.
Washington, D.C. 20036

TAMI LYN AZORSKY
[illegible]ENNA & CUNEO, LLP
[illegible] K Street, N.W.
Washington, D.C. 20006

JAY E. SILBERG
Counsel of Record
DAVID J. CYNAMON
SETH B. WAXMAN
SHAW PITTMAN POTTS
& TROWBRIDGE
2300 N Street, N.W.
Washington, D.C. 20037
(202) 663-8063

November 2, 1998

(4)

No. 98-384

FILED
NOV 13 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

UNITED STATES OF AMERICA, ET AL.,
Petitioners,

v.

NORTHERN STATES POWER COMPANY, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

SUPPLEMENTAL BRIEF IN OPPOSITION FOR THE UTILITY RESPONDENTS

Of Counsel:
JERRY STOUCK
ROBERT L. SHAPIRO
SPRIGGS & HOLLINGSWORTH
1350 I Street, N.W.
9th Floor
Washington, D.C. 20005

PETER BUSCEMI
MORGAN, LEWIS & BOCKIUS, LLP
1800 M Street, N.W.
Washington, D.C. 20036

TAMI LYN AZORSKY
MCKENNA & CUNEO, LLP
1900 K Street, N.W.
Washington, D.C. 20006

JAY E. SILBERG
Counsel of Record
DAVID J. CYNAMON
SETH B. WAXMAN
SHAW PITTMAN POTTS
& TROWBRIDGE
2300 N Street, N.W.
Washington, D.C. 20037
(202) 663-8063

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

41pp

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-384

UNITED STATES OF AMERICA, ET AL.,
Petitioners,

v.

NORTHERN STATES POWER COMPANY, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

SUPPLEMENTAL BRIEF IN OPPOSITION FOR THE UTILITY RESPONDENTS *

Subsequent to submitting their Brief in Opposition to the printer, the Utility Respondents learned that the Court of Federal Claims issued decisions in three of the pending breach of contract actions to which the Utility Respondents referred in their Brief in Opposition at 19. The Court of Federal Claims expressly accepted a critical principle of the Utility Respondents' Brief in Opposition—that the D.C. Circuit issued its mandamus order in *Northern States Power Co. v. Department of Energy*, 128 F.3d 754 (D.C. Cir. 1997), "in order to effectuate its decision in *Indiana Michigan" Power Co. v. United States*, 88 F.3d 1272 (D.C. Cir. 1996). *See Yankee Atomic Electric Co. v.*

* Pursuant to Rule 29.6, the Utility Respondents state that their parent companies and nonwholly owned subsidiaries are listed in their Brief in Opposition.

United States, No. 98-126C, slip op., reproduced in Supplemental Appendix ("SA") at SA-18. Similarly, the Court of Federal Claims also described *Northern States Power* as "summarizing" and as having "reiterated" the D.C. Circuit's holding in *Indiana Michigan. See Yankee Atomic,* SA-32, 17.

In *Yankee Atomic* and the companion cases of *Connecticut Yankee Atomic Power Co. v. United States,* No. 98-154C and *Maine Yankee Atomic Power Co. v. United States,* No. 98-474C, the plaintiff utilities, which are parties to Standard Contracts with the government, seek, *inter alia,* damages in the Court of Federal Claims for the government's failure to commence disposing of spent nuclear fuel by January 31, 1998. The government moved to dismiss the utilities' complaints, arguing, *inter alia,* that the utilities failed to pursue administrative dispute resolution procedures provided for in the Standard Contract. The utilities cross-moved for summary judgment on contract liability, arguing that the government failed to perform a contractual duty when due. The Court of Federal Claims denied the government's motions to dismiss and granted the utilities' cross-motion for summary judgment on contract liability. In so holding, the court noted that the breach of contract issue was straightforward given the government's failure to meet the unconditional deadline supplied by the contract. *See Yankee Atomic,* SA-25-26, n.4.

As the Utility Respondents anticipated in their Brief in Opposition at 19-20, the Court of Federal Claims gave great weight to the D.C. Circuit's interpretation of the government's obligations in *Indiana Michigan,* wholly apart from the subsequent mandamus enforcement order from which the government now appeals. In granting the utilities' cross-motions, the court accepted *Indiana Michigan*'s holding that the NWPA mandated the government to assume a contractual obligation to start disposing of SNF by January 31, 1998 "without qualification or con-

dition." *See Yankee Atomic*, SA-32; *see also Maine Yankee Order*, reproduced in SA at SA-3. In its opinion relying upon the D.C. Circuit's construction of the NWPA, the Court of Federal Claims twice highlighted the fact that the government did not appeal the *Indiana Michigan* decision. *See Yankee Atomic*, SA-17, 32.

The Court of Federal Claims' application of the *Indiana Michigan* holding in this manner confirms that *Indiana Michigan* itself has, in the government's words, "ultimately affect[ed] the outcome of the litigation regarding claims relating to the Standard Contract." *See* 19-20, n.10. This noncontroversial application of *Indiana Michigan* also confirms that the *Northern States Power* decision represents no issue worthy of this Court's review.

Respectfully submitted,

Of Counsel:
JERRY STOUCK
ROBERT L. SHAPIRO
SPRIGGS & HOLLINGSWORTH
1350 I Street, N.W.
9th Floor
Washington, D.C. 20005

PETER BUSCEMI
MORGAN, LEWIS & BOCKIUS, LLP
1800 M Street, N.W.
Washington, D.C. 20036

TAMI LYN AZORSKY
MCKENNA & CUNEO, LLP
1900 K Street, N.W.
Washington, D.C. 20006

JAY E. SILBERG
Counsel of Record
DAVID J. CYNAMON
SETH B. WAXMAN
SHAW PITTMAN POTTS
& TROWBRIDGE
2300 N Street, N.W.
Washington, D.C. 20037
(202) 663-8063

November 13, 1998

APPENDIX

APPENDIX

APPENDIX

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

No. 98-474C
(Filed November 3, 1998)

MAINE YANKEE ATOMIC POWER COMPANY,
Plaintiff,

v.

THE UNITED STATES,
Defendant.

ORDER

This matter is before the court on plaintiff's motion for partial summary judgment pursuant to Rule 56 of the Rules of the United States Court of Federal Claims ("RCFC") and defendant's motion to dismiss pursuant to Rule 12(b)(4). All of the issues raised by the motions, except one, have been resolved by orders issued in *Yankee Atomic Power Co. v. United States*, Fed. Cl. No. 98-126C (Opinion and Order dated October 29, 1998), and *Connecticut Yankee Atomic Power Co. v. United States*, Fed. Cl. No. 98-154C (Order dated October 30, 1998). The sole issue to be resolved herein is whether Maine Yankee's claims against the United States are ripe for decision.

BACKGROUND

Pursuant to Article IV.B of the Standard Contract executed by Maine Yankee and DOE, the agency is required to issue, beginning April 1, 1991, an annual acceptance priority ranking ("APR") for receipt of SNF at the DOE repository. The APR is based on the age

of SNF to be disposed of, with the oldest SNF generally having the highest priority for acceptance. 10 C.F.R. § 961.11, Art. IV.B ¶ 5(a). Article IV.B also requires that DOE issue, beginning not later than July 1, 1987, an annual capacity report ("ACR") for planning purposes. The ACR is to set forth the projected annual receiving capacity for the DOE facility(ies). *Id.* ¶ 5(b).

The most recent APR/ACR was issued by DOE in March 1995. The excerpt provided by defendant indicates that DOE does not plan to begin disposing of Maine Yankee's SNF in the repository until the second year of its operation. According to the government, this means that:

> Had a permanent repository constructed under the NWPA been available to DOE in January, 1998, for use in meeting its NWPA disposal obligations, calendar year 1998 would have been "year one" in the disposal queue. Maine Yankee had no disposal allocations in year one of the disposal queue; hence, none of its fuel would have been subject to NWPA disposal during calendar year 1998 even had the NWPA repository been constructed.

Def.'s Supp. Mot. to Dismiss at 3 (citations to the record omitted). Defendant argues that "[b]ecause Maine Yankee had no entitlement to disposal of its SNF during 1998, its complaint should be dismissed as unripe for decision since Maine Yankee has not yet suffered any injury in fact." *Id.* "Maine Yankee's claim is not ripe because DOE's obligation to begin disposal of Maine Yankee's SNF does not require any removal of SNF before 1999." *Id.* at 7.

DISCUSSION

The APR/ACR issued by DOE may indeed indicate that, had a permanent repository been available in 1998, DOE would not have begun disposing of Maine Yankee's

SNF in that repository until 1999. However, it does not follow that Maine Yankee "had no entitlement to disposal of its SNF during 1998," or that "DOE's obligation to begin disposal of Maine Yankee's SNF does not require any removal of SNF before 1999." On the contrary, under Article II of the Standard Contract, DOE was obligated to begin accepting, transporting, and disposing of Maine Yankee's SNF "not later than January 31, 1998." 10 C.F.R. § 961.11, Art. II. Aside from Maine Yankee's duty to pay fees (which it has done), DOE's obligation under Article II is without qualification or condition—*i.e.*, it is not qualified by or conditioned on either the information DOE includes in the APR/ACRs or the existence of a permanent repository constructed pursuant to the NWPA. *See Yankee Atomic*, slip op. at 21-22; *Indiana Mich. Power Co. v. Dep't of Energy*, 88 F.3d 1272 (D.C. Cir. 1996).

DOE did not fulfill its unconditional obligation under Article II, and Maine Yankee alleges it has incurred damages as a result. Compl. ¶¶ 21-27, 31-32. Accordingly, this matter involves a concrete controversy which is properly before the court pursuant to the Tucker Act, 28 U.S.C. § 1491(a)(1) (1994).

CONCLUSION

Based on the foregoing, and for the reasons stated in *Yankee Atomic Power Co. v. United States*, Fed. Cl. No. 98-126C (Opinion and Order dated October 29, 1998), and *Connecticut Yankee Atomic Power Co. v. United States*, Fed. Cl. No. 98-154C (Order dated October 30, 1998), it is hereby ORDERED:

(1) Defendant's August 19, 1998 Supplemental Motion to Dismiss is GRANTED to the extent it seeks dismissal of Count IV of the complaint. Defendant's motion is otherwise DENIED. When final judgment is entered by the Clerk in this matter, it shall reflect the dismissal of Count IV;

(2) Plaintiff's August 10, 1998 Motion for Summary Judgment on Contract Liability is GRANTED; and

(3) A Pretrial Order will be entered shortly scheduling further procedings in this matter.

/s/ James F. Merow
JAMES F. MEROW
Senior Judge

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

No. 98-154C
(Filed October 30, 1998)

CONNECTICUT YANKEE ATOMIC POWER COMPANY,
Plaintiff,

v.

THE UNITED STATES,
Defendant.

ORDER

This matter is before the court on defendant's motion to dismiss pursuant to Rule 12(b)(4) of the Rules of the United States Court of Federal Claims ("RCFC") and plaintiff's cross-motion for partial summary judgment pursuant to RCFC 56. The issues raised by the motions are substantively identical—with one exception—to those addressed in *Yankee Atomic Electric Co. v. United States,* Fed. Cl. No. 98-126C (Opinion and Order dated October 29, 1998).

Yankee Atomic had paid all of the charges due under its contract with the Department of Energy. In light of the contract and statutory provisions prohibiting a refund of the charges, it was concluded that no adjustment was available under the contract. Consequently, Yankee's breach claim in Count I of the complaint was not converted into a claim arising under the contract and subject to the disputes clause. *Yankee Atomic,* slip op. at 19-20.

Connecticut Yankee has paid all of its fees for SNF used to generate electricity on or after April 7, 1983, but it has not yet paid the one-time fee for SNF used to

generate electricity before that date. This raises the issue of whether an adjustment to the one-time fee is available under Article IX.B of the contract. If an adjustment is available, plaintiff would be required to pursue it administratively in accordance with Article XVI of the contract. Only then would it be permitted, in light of the rights reserved in Article XI, to pursue additional remedies, if any, which may be available at law. *See id.* at 12, 17-19; *Nager Elec. Co., Inc. v. United States,* 177 Ct. Cl. 234, 251-55, 368 F.2d 847, 859-61 (1966); *Zidell Explorations, Inc. v. United States,* 192 Ct. Cl. 331, 338 & n.4, 427 F.2d 735, 739 & n.4 (1970); *Shermco Indus., Inc. v. United States,* 231 Ct. Cl. 1025, 1026 (1982) ("The rule is that if relief is available under the contract, then a contractor must exhaust its administrative remedies before seeking relief in court.").

Section 302(a)(3) of the NWPA establishes the criteria the one-time fee for SNF used to generate electricity before April 7, 1983 must meet and states that it "shall be paid" into the Waste Fund. 42 U.S.C. § 10222(a)(3). Article VIII of the contract sets the fee in accordance with the mandatory statutory criteria and states: "This fee shall not be subject to adjustment." 10 C.F.R. § 961.11, Art. VIII ¶ 2. DOE does not argue that an adjustment can be made under Article IX.B despite the plain prohibition in Article VIII.

Accordingly, it is concluded that no adjustment to the contract charges is available to Connecticut Yankee under Article IX.B of the contract. Therefore, and for the reasons stated in the *Yankee Atomic* opinion, it is hereby ORDERED:

(1) Defendant's June 4, 1998 Motion to Dismiss Pursuant to RCFC 12(b)(4) is GRANTED to the extent it seeks dismissal of Count IV of the complaint. Defendant's motion is otherwise DENIED. When final judgment

is entered by the Clerk in this matter, it shall reflect the dismissal of Count IV;

(2) Plaintiff's July 2, 1998 Cross-Motion for Summary Judgment on Contract Liability is GRANTED; and

(3) A Pretrial Order will be entered shortly scheduling further proceedings in this matter.

/s/ James F. Merow
JAMES F. MEROW
Senior Judge

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

No. 98-126C
(Filed October 29, 1998)

YANKEE ATOMIC ELECTRIC COMPANY,
Plaintiff,

v.

THE UNITED STATES,
Defendant.

Motion to dismiss; exhaustion of administrative remedies; breach claim versus claim "arising under" contract; unavailability of contractual relief; breach of contract; partial summary judgment; implied duty of good faith and fair dealing; taking; illegal exaction.

OPINION

MEROW, *Judge.*

This matter is before the court on defendant's motion to dismiss pursuant to Rule 12(b)(4) of the Rules of the United States Court of Federal Claims ("RCFC") and plaintiff's cross-motion for partial summary judgment pursuant to RCFC 56. At issue is a contract under which the defendant, the United States Department of Energy ("DOE"), promised to dispose of spent nuclear fuel and high-level radioactive waste (collectively "SNF") generated by the plaintiff, Yankee Atomic Power Co. ("Yan-

kee"), in exchange for Yankee's payment of fees. Contract services were to begin not later than January 31, 1998. In the complaint, Yankee asserts that it has paid all the fees but DOE has not begun disposing of its SNF. Yankee alleges that DOE's inaction is a partial breach of the express and implied contract terms (Counts I-II); a taking of the property where Yankee's now-inoperative nuclear facility is located (Count III); and an illegal exaction of the SNF storage costs Yankee is incurring (Count IV). Yankee seeks a judgment of at least $70 million under each count.

Defendant has moved to dismiss the complaint on the ground that Yankee has not exhausted the administrative dispute resolution procedures mandated by the disputes clause of the contract. Plaintiff opposes the motion, contending that the disputes clause is inapplicable because Yankee's claims do not arise under the contract. Plaintiff has also cross-moved for partial summary judgment under Count I. Plaintiff asserts that it is entitled to judgment as a matter of law on the issue of contract liability because DOE's failure to begin SNF disposal services by January 31, 1998 is a clear breach of the express contract terms. Defendant opposes the motion, asserting that DOE's alleged delay in performance is cognizable and redressable under the contract and therefore cannot be a breach. Defendant also contends that factual issues as to whether DOE commenced contract services by January 31, 1998 preclude the entry of judgment in plaintiff's favor.

For the reasons stated below, it is concluded that Counts I-III of the complaint are not redressable under the contract and, as a result, the administrative procedures in the disputes clause are inapplicable. Therefore, defendant's motion to dismiss Counts I-III is denied. Defendant's motion to dismiss Count IV is granted, however, because Count IV fails to state a claim for which relief can be granted. Finally, it is concluded that DOE

breached its contractual obligation to begin disposing of Yankee's SNF by January 31, 1998. Accordingly, plaintiff's cross-motion for summary judgment on the issue of liability under Count I is granted.

I. BACKGROUND

Unless otherwise indicated, the following facts are undisputed. These facts are derived from the materials presented by the parties with respect to both pending motions.

a. Background on Yankee

Yankee is a utility company whose only electricity-generating facility is a nuclear power plant located in Rowe, Massachusetts. The plant was shut down in 1991, and Yankee has taken steps to dismantle it and to return the site to unrestricted use. This process is substantially complete except for work dependent on the removal of about 127 metric tons of SNF generated during the plant's operation.

b. Statutory Background

In 1982, Congress passed the Nuclear Waste Policy Act, 42 U.S.C. §§ 10101-10270 (1994) ("NWPA" or "Act"), which establishes a comprehensive framework for disposing of SNF generated by civilian nuclear reactors. Congress identified four objectives in passing the NWPA: developing repositories to protect the public and the environment from the hazards of SNF; establishing federal responsibility and a federal policy for SNF disposal; defining the relationship between federal and state governments regarding SNF disposal; and establishing a Nuclear Waste Fund, composed of payments from generators and owners of SNF, to ensure that the federal government's costs of carrying out SNF disposal activities "will be borne by the persons responsible for generating such [SNF]." 42 U.S.C. § 10131(b).

Section 302(a)(1) of the NWPA authorizes the Secretary of DOE to enter into contracts with owners and generators of SNF under which DOE will accept, transport, and dispose of the SNF in exchange for the payment of fees. 42 U.S.C. § 10222(a)(1). Section 302(a)(5) sets forth certain contractual obligations which DOE must assume:

> (5) Contracts entered into under this section shall provide that—
>
> (A) following commencement of operations of a repository, the Secretary shall take title to the [SNF] involved as expeditiously as practicable upon the request of the generator or owner of such [SNF]; and
>
> (B) in return for the payment of fees established by this section, the Secretary, beginning not later than January 31, 1998, will dispose of the [SNF] involved as provided in this subchapter.

42 U.S.C. § 10222(a)(5).

The contract fees are established in Sections 302(a)(2) and (a)(3) of the Act. These provisions assess a one-time fee based on the amount of electricity generated in a nuclear power reactor prior to the effective date of the Act and an-ongoing fee based on the amount of such power generated thereafter. 42 U.S.C. § 10222(a)(2)-(3). Once the full amount due has been paid, the utility has no further financial obligation to the federal government for the disposal of its SNF. *Id.*

Pursuant to Section 302(c), DOE is directed to deposit fee payments, "immediately upon their realization," into a Nuclear Waste Fund established in the U.S. Treasury. 42 U.S.C. § 10222(c). DOE may make expenditures from the Waste Fund only for limited radioactive waste disposal activities listed in Section 302(d). 42

U.S.C. § 10222(d). Each year, DOE must review the fees collected to ensure that they cover the costs of the listed disposal activities. 42 U.S.C. § 10222(a)(4). If necessary to ensure a full cost recovery, DOE may, with the approval of Congress, adjust the contract fees. *Id.*

c. Contract Provisions

On April 18, 1983, following notice and comment, DOE promulgated a Standard Contract for the Disposal of SNF ("Standard Contract") implementing Section 302 of the NWPA. 48 Fed. Reg. 16,590 (1983) (codified at 10 C.F.R. pt. 961). Article II, "Scope," sets forth the basic obligations assumed by DOE and the SNF owner or generator ("Purchaser"):

> This contract applies to the delivery by Purchaser to DOE of [SNF] of domestic origin from civilian nuclear power reactors, acceptance of title by DOE to such [SNF], subsequent transportation and disposal of such [SNF] and, with respect to such material, establishes the fees to be paid by the Purchaser for the services to be rendered hereunder by DOE. The [SNF] shall be specified in a delivery commitment schedule as provided in Article V below. The services to be provided by DOE under this contract shall begin, after commencement of facility operations, [1] not later than January 31, 1998 and shall continue until such time as all [SNF] . . . has been disposed of.

10 C.F.R. § 961.11, Art. II.

Article VIII, "Fees and Terms of Payment," establishes a one-time fee for SNF used to generate electricity

---

1 A "DOE facility" is defined in the Standard Contract as "a facility operated by or on behalf of DOE for the purpose of disposing of [SNF], or such other facility(ies) to which [SNF] may be shipped by DOE prior to its transportation to a disposal facility." 10 C.F.R. § 961.11, Art. I ¶ 10.

before April 7, 1983. This fee "shall not be subject to adjustment." 10 C.F.R. § 961.11, Art. VIII ¶ 2. Article VIII also establishes an on-going fee for SNF used to generate electricity on or after April 7, 1983. *Id.* ¶ 1 DOE reserves the right to adjust this fee, with the approval of Congress, if necessary to ensure a full recovery of the costs of activities authorized by the NWPA. However, "[a]ny adjustment . . . shall be prospective." *Id.* ¶ 11.

Article IX, "Delays," provides:

> *A. Unavoidable Delays by Purchaser or DOE*
>
> Neither the Government nor the Purchaser shall be liable under this contract for damages caused by failure to perform its obligations hereunder, if such failure arises out of causes beyond the control and without the fault or negligence of the party failing to perform. In the event circumstances beyond the reasonable control of the Purchaser or DOE—such as acts of God, or of the public enemy, acts of Government in either its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes and unusually severe weather—cause delay in scheduled delivery, acceptance or transport of [SNF], the party experiencing the delay will notify the other party as soon as possible after such delay is ascertained and the parties will readjust their schedules, as appropriate, to accommodate such delay.
>
> *B. Avoidable Delays by Purchaser or DOE*
>
> In the event of any delay in the delivery, acceptance or transport of [SNF] to or by DOE caused by circumstances within the reasonable control of either the Purchaser or DOE of their respective contractors or suppliers, the charges and schedules spec-

ified by this contract will be equitably adjusted to reflect any estimated additional costs incurred by the party not responsible for or contributing to the delay.

10 C.F.R. § 961.11, Art. IX.

Article XI, "Remedies," provides that "[n]othing in this contract shall be construed to preclude either party from asserting its rights and remedies under the contract or at law." 10 C.F.R. § 961.11, Art. XI.

Article XVI, "Disputes," establishes an administrative procedure for the resolution of controversies "arising under" the contract:

> A. Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer ["CO"], who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Purchaser. The decision of the [CO] shall be final and conclusive unless within ninety (90) days from the date of receipt of such copy, the Purchaser mails or otherwise furnishes to the [CO] a written appeal addressed to the DOE Board of Contract Appeals (Board). The decision of the Board shall be final and conclusive unless determined by a court of competent jurisdiction to have been fraudulent, or capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith or not supported by substantial evidence. In connection with any appeal proceeding under this clause, the Purchaser shall proceed diligently with the performance of the contract and in accordance with the [CO]'s decision.
>
> B. For Purchaser claims of more than $50,000, the Purchaser shall submit with the claim a certification that the claim is made in good faith; the sup-

porting data are accurate and complete to the best of the Purchaser's knowledge and belief; and the amount requested accurately reflects the contract adjustment for which the Purchaser believes the Government is liable. . . .

* * * *

D. This "Disputes" clause does not preclude consideration of law questions in connection with decisions provided for in paragraph A above; *provided, however,* that nothing in this contract shall be construed as making final the decision of any administrative official, representative, or board on a question of law.

10 C.F.R. § 961.11, Art. XVI.

Aside from the certification requirement for claims in excess of $50,000, Article XVI is substantively identical to the standard disputes clause used in government contracts before passage of the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613 (1994) ("CDA"). *See, e.g.,* 41 C.F.R. § 1-7.102-12 (1977). DOE decided to adhere to the pre-CDA dispute resolution process after concluding that the CDA did not apply to contracts for services to be provided by the government. 48 Fed. Reg. at 16,595; *see* 41 U.S.C. § 602(a).

On June 22, 1983, Yankee and the government executed a Standard Contract for the disposal of SNF generated by Yankee's Rowe, Massachusetts facility. Yankee has paid all fees, totaling approximately $22.4 million, required by Article VIII of the contract. DOE has not begun accepting, transporting, or disposing of Yankee's SNF.

d. Related Proceedings

In 1993, several states and utilities expressed concern about DOE's ability to begin disposing of SNF by January 31, 1998. On May 25, 1994, DOE responded by

publishing a "Notice of Inquiry" in the Federal Register. 59 Fed. Reg. 27,007 (1994). DOE indicated that it would not be in a position to begin disposing of SNF by January 31, 1998 because a repository constructed in accordance with the NWPA would not be operational until, at the earliest, the year 2010. *Id.* at 27,008. DOE sought comments from affected parties on related issues, including the agency's preliminary view that it did not have a statutory obligation to accept SNF in 1998 in the absence of an operational, statutorily authorized repository or interim storage facility. *Id.* DOE also sought comments regarding use of the Waste Fund to offset "a portion of the financial burden that may be incurred by utilities in continuing to store [SNF] at reactor sites beyond 1998." *Id.* at 27,008-09.

On May 3, 1995, after reviewing comments, DOE published its "Final Interpretation of Nuclear Waste Acceptance Issues." 60 Fed. Reg. 21,793 (1995). The agency concluded definitively that "it does not have an unconditional statutory or contractual obligation to accept [SNF] beginning January 31, 1998 in the absence of a repository or interim storage facility constructed under the [NWPA]." *Id.* DOE also found that Section 302(d) of the Act did not permit use of the Waste Fund to help utilities defray the costs of storing SNF on-site beyond 1998. *Id.* at 21,797. However, the agency stated that if the NWPA were construed to unconditionally obligate it to begin disposal services by January 31, 1998, relief might be available under Article IX of the Standard Contract. *Id.*

Pursuant to Section 119 of the NWPA, a group of utilities and state agencies (not including Yankee) brought suit in the United States Court of Appeals for the District of Columbia Circuit challenging DOE's Final Interpretation. *See* 42 U.S.C. § 10139. In a decision issued July 23, 1996, the circuit court held that DOE's duty to begin SNF disposal services by January 31, 1998 was *not* con-

ditioned on the existence of a repository or interim storage facility constructed under the NWPA and vacated the agency's Final Interpretation. *Indiana Michigan Power Co. v. United States,* 88 F.3d 1272 (D.C. Cir. 1996). The court found that Section 302(a)(5)(B) of the Act required DOE to assume a contractual obligation, "reciprocal to the utilities' obligation to pay, to start disposing of the SNF no later than January 31, 1998." *Id.* at 1277. Aside from the utilities' payment of fees, the court held, DOE's obligation was "without qualification or condition." *Id.* at 1276. DOE did not request a rehearing or petition the U.S. Supreme Court for a writ of *certiorari.*

Following the *Indiana Michigan* decision, DOE notified Standard Contract holders and other interested parties that it would not begin accepting SNF by January 31, 1998 because it lacked a repository or interim storage facility constructed pursuant to the NWPA. The agency also made a preliminary determination that its inability to meet the January 31, 1998 deadline was an unavoidable, non-compensable delay under Article IX.A of the Standard Contract.

A number of utilities and state agencies, including Yankee, petitioned the circuit court for a writ of *mandamus* directing DOE to begin SNF disposal services by January 31, 1998. In an opinion issued November 14, 1997, the court granted the petition in part. *Northern States Power Co. v. Department of Energy,* 128 F.3d 754 (D.C. Cir. 1997). The court reiterated its holding in *Indiana Michigan* that the NWPA "clearly demonstrates a congressional intent that [DOE] assume a contractual obligation to perform by the 1998 deadline, 'without qualification or condition.' " *Id.* at 758. The court also found that Article II of the Standard Contract fulfilled Congress' intent in this regard:

> DOE's duty to take the materials by the 1998 deadline is also an integral part of the Standard Contract,

> which provides that the Department "shall begin" disposing of the SNF by January 31, 1998. 10 C.F.R. § 961.11, Art. II. The contractual obligations created consistently with the statutory contemplation leave no room for DOE to argue that it does not have a clear duty to take the SNF from the owners and generators by the deadline imposed by Congress.

Id. at 758-59.

Despite DOE's clear duty, the court declined to issue a broad writ directing the agency to begin taking SNF by January 31, 1998 because it found that a potentially adequate contractual remedy was available in the form of an equitable adjustment under Article IX.B. The court held that petitioners were required to pursue this remedy in the event of a delay. *Id.* at 759.

However, in order to effectuate its decision in *Indiana Michigan*, the court issued a writ of *mandamus* precluding DOE from continuing to excuse its failure to begin SNF disposal services by January 31, 1998 on the ground that it lacked an authorized repository or interim storage facility. *Id.* at 760-61. A consequence of this holding, the court stated, was that DOE "not implement any interpretation of the Standard Contract that excuses its failure to perform on the grounds of 'acts of Government in either its sovereign or contractual capacity.'" *Id.* at 760 (quoting 10 C.F.R. § 961.11, Art. IX.A). As a result, DOE maintains that it is prohibited from arguing that its failure to begin SNF disposal services is an unavoidable, noncompensable delay under Article IX.A of the Standard Contract.

Yankee and DOE petitioned the circuit court for a rehearing of the *Northern States* case. The petitions were denied in an unpublished order dated May 5, 1998. In September 1998, DOE petitioned the Supreme Court for a writ of *certiorari*. The Court has not yet acted on the petition. DOE has not moved to stay proceedings in this court pending the outcome of its petition.

e. Proceedings Before the Court

On February 18, 1998, Yankee filed a four-count complaint in this court seeking a judgment of at least $70 million under each count. This figure consists primarily of the costs Yankee is incurring storing SNF at its inoperative facility. In Count I, Yankee asserts that DOE's failure to begin disposing of Yankee's SNF is a partial breach of Article II of the Standard Contract which, according to Yankee, imposes an unconditional obligation on DOE to begin disposal services by January 31, 1998. In Count II, Yankee asserts that DOE has breached the implied contractual duty of good faith and fair dealing by failing to dispose of Yankee's SNF despite the present capability to do so; failing to take appropriate steps to ensure that it would be in a position to begin disposal services by January 31, 1998; and otherwise unreasonably failing to perform its duties under the contract. In Count III, Yankee asserts that DOE's failure to begin disposal services amounts to a taking of Yankee's Rowe, Massachusetts property for which just compensation is due under the Fifth Amendment to the U.S. Constitution. Finally, in Count IV, Yankee asserts that DOE's failure to begin disposal services violates the NWPA and effects an illegal exaction of SNF storage costs from Yankee.

On June 4, 1998, defendant filed a motion to dismiss pursuant to RCFC 12(b)(4), asserting that the complaint does not state a claim for which relief can be granted. Defendant contends that the event giving rise to each of Yankee's claims—DOE's alleged delay in performance—is, at most, an avoidable delay under Article IX.B. of the Standard Contract. Therefore, defendant reasons, Yankee has no valid breach, taking, or illegal exaction claim. Rather, Yankee has only a claim for an equitable adjustment under Article IX.B which it must pursue through the administrative procedures in the disputes clause before seeking relief in court.

On July 2, 1998, plaintiff filed its opposition and cross-motion for partial summary judgment. Plaintiff contends

that defendant's motion to dismiss Count I must be denied because DOE's failure to begin SNF disposal services is a pure breach of Article II, not a "delay" cognizable under Article IX.B. Furthermore, plaintiff reasons, even if Article IX.B were applicable, it does not offer any relief in this case and therefore does not convert Yankee's breach claim into a claim arising under the contract. As a result, plaintiff asserts, Count I is not subject to administrative resolution under the disputes clause and is properly before the court. Plaintiff also maintains that defendant's motion to dismiss Counts II-IV must be denied because those claims also are not cognizable or redressable under any contract clause. Finally, plaintiff contends that its cross-motion for summary judgment on the issue of liability under Count I must be granted because DOE's failure to begin SNF disposal services by January 31, 1998 is, as a matter of law, a breach of Article II.

Briefing was completed on August 13, 1998 and oral argument was held on September 16, 1998. Supplemental briefing on the issue of whether relief is available under the contract was completed on October 8, 1998.

II. DISCUSSION

a. Legal Background Regarding the Disputes Clause

As stated above, aside from the certification requirement for claims exceeding $50,000, Article XVI of the Standard Contract is similar to the disputes clause used in government contracts before passage of the CDA. DOE decided to utilize the pre-CDA dispute resolution process after concluding that the CDA was inapplicable. Therefore, legal principles relating to the pre-CDA clause and dispute resolution process apply here and are summarized below.

The pre-CDA disputes clause establishes an administrative mechanism for adjudicating claims "arising under"

the contract. Such claims must be submitted to the CO whose decision is final and conclusive unless appealed to the agency board of contract appeals ("board"). *E.g.*, 10 C.F.R. § 961.11, Art. XVI ¶ A. If the contractor is dissatisfied with the board's decision, only then may it seek relief in the proper court. *See Nager Elec. Co., Inc. v. United States*, 177 Ct. Cl. 234, 251-52, 368 F.2d 847, 859 (1966). The scope of judicial review is limited to the administrative record developed by the board. *United States v. Carlo Bianchi & Co., Inc.*, 373 U.S. 709, 714 (1963). Under the Wunderlich Act, 41 U.S.C. §§ 321-22 (1994), the board's factual findings will not be disturbed unless shown to be fraudulent, arbitrary or capricious, so grossly erroneous as necessarily to imply bad faith, or unsupported by substantial evidence. 41 U.S.C. § 321. The board's legal determinations are not entitled to finality, however, and must be resolved independently by the court. 41 U.S.C. § 322; 10 C.F.R. § 961.11, Art. XVI ¶ A; *Blake Constr. Co., Inc. v. United States*, 220 Ct. Cl. 56, 59, 597 F.2d 1357, 1359 (1979).

When a controversy "arises under" the contract, the contractor "must seek the relief provided for under the contract or be barred from any relief in the courts." *Crown Coat Front Co., Inc. v. United States*, 386 U.S. 503, 512 (1967); *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 402, 444 n.22 (1966). This is because the administrative mechanism in the dispute clause "is exclusive in nature. Solely through its operation may claims be made and adjudicated as to matters arising under the contract." *United States v. Joseph A. Holpuch Co.*, 328 U.S. 234, 239-40 (1946). An exception is made only if it clearly appears that the administrative procedures are "inadequate or unavailable"—when, for example, the CO or the board "so clearly reveals an unwillingness to act and to comply with the administrative procedures in the contract that the contractor or supplier is justified in concluding that those procedures have thereby become 'unavailable.' " *United States v. Anthony Grace & Sons, Inc.*, 384 U.S. 424, 429-30 (1966).

A controversy "arises under" the contract and is subject to the disputes clause "to the extent complete relief is available under a specific provision of the contract." *Edward R. Marden Corp. v. United States*, 194 Ct. Cl. 799, 804, 442 F.2d 364, 366-67 (1971). "A corollary principle is that, to the extent complete relief is not made available under a specific contract provision, a controversy is not subject to administrative determination via the Disputes clause and may be tried de novo in the proper court." *Id.* at 805, 442 F.2d at 367; *Utah Constr.*, 384 U.S. at 402, 412.

"Complete relief" means a reasonably adequate substitute for the damages available in a breach action. *See William Green Constr. Co., Inc. v. United States*, 201 Ct. Cl. 616, 622-26, 477 F.2d 930, 934-37 (1973) (contractor does not retain breach claim for improper default termination where convenience termination award available under contract provides "a full and permissible substitute for the award of damages under the former 'breach' claim"), *cert. denied*, 417 U.S. 909 (1974); *Chaney & James Constr. Co., Inc. v. United States*, 190 Ct. Cl. 699, 706-07, 421 F.2d 728, 732 (1970) (where contract clause is intended as substitute for action at law for breach, "the contractor should be entiled to get the same relief under the clause that he could get in the absence of the clause if he sued for breach of contract"); *Gregory Lumber Co. v. United States*, 9 Cl. Ct. 503, 517 (a claim arises under the contract "when there is a specific contractual clause through which the contractor can get 'all the relief to which it is entitled and asks' ") (quoting *Zidell Explorations, Inc. v. United States*, 192 Ct. Cl. 331, 334, 427 F.2d 735, 737 (1970)). A contract provision affording complete relief serves to convert a breach claim into a claim "arising under" the contract and subject to the disputes clause. *Utah Constr.*, 384 U.S. at 404 n.6, 418; *Len Co. & Assocs. v. United States*, 181

Ct. Cl. 29, 36, 385 F.2d 438, 442 (1967); *Gregory Lumber Co.*, 9 Cl. Ct. at 517-18.[2]

b. Defendant's Motion to Dismiss Count I

"The grant of a motion to dismiss for failure to state a claim upon which relief may be granted is appropriate where the plaintiff cannot assert a set of facts that supports its claim." *New Valley Corp. v. United States*, 119 F.3d 1576, 1579 (Fed. Cir. 1997); *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). In ruling on the motion, the court must assume the well-pled factual assertions in the complaint are true and make all reasonable inferences in plaintiff's favor. *New Valley*, 119 F.3d at 1580.

Defendant contends that Count I must be dismissed because it alleges, at most, an avoidable delay arising under Article IX.B of the contract. Therefore, defendant reasons, plaintiff must exhaust the administrative procedures in the disputes clause before seeking relief in court. Plaintiff responds that Article IX.B applies only to delays in *ongoing* performance, such as an unexpected problem with the DOE train or truck being used for SNF transport. As a result, plaintiff asserts, the clause does not encompass Count I which alleges that DOE failed to even begin SNF disposal services by the January 31, 1998 deadline.

"Contract interpretation begins with the plain language of the agreement." *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991). "A contract is read in accordance with its express terms and the plain meaning thereof." *C. Sanchez and Son, Inc. v. United States*, 6 F.3d 1539, 1543 (Fed. Cir. 1993). "Where contract

---

[2] The CDA abolished the disparate treatment of breach claims and claims "arising under" the contract by requiring that all claims "relating to a contract" be submitted to the CO for decision. 41 U.S.C. § 605(a). A contractor dissatified with the CO's decision on any claim, breach or otherwise, can appeal either to this court or the relevant board where the claim will be reviewed *de novo*. 41 U.S.C. §§ 606-07, 609(a).

provisions are clear and unambiguous, they must be given their plain and ordinary meaning." *Alaska Lumber & Pulp Co., Inc. v. Madigan*, 2 F.3d 389, 392 (Fed. Cir. 1993).

Article IX.B, "Avoidable Delays by Purchaser or DOE," provides:

> In the event of any delay in the delivery, acceptance or transport of [SNF] to or by DOE caused by circumstances within the reasonable control of either the Purchaser or DOE or their respective contractors or suppliers, the charges and schedules specified by this contract will be equitably adjusted to reflect any estimated additional costs incurred by the party not responsible for or contributing to the delay.

10 C.F.R. § 961.11, Art. IX.B. The plain language of the clause covers "any delay" in acceptance of SNF by DOE. "Any" is a common term defined as "some, no matter how much or how little, how many, or what kind." *Webster's New World Dictionary* 62 (3d College ed. 1988). "Delay" is also an ordinary term meaning "to put off to a future time; postpone." *Id.* at 364. Plaintiff does not allege that DOE will *never* fulfill its obligation to accept Yankee's SNF. Rather, the agency has stated that it is going to postpone its obligation until 2010, when it anticipates having an SNF repository constructed and licensed under the NWPA. While this delay in acceptance is certainly long, it falls under the plain, broad language in Article IX.B.[3] Therefore, Article IX.B will convert

---

[3] In an attempt to avoid the plain language of the clause, plaintiff contends that Article IX.A establishes a distinction betwen a "failure to perform" and a "delay" which must be carried over into Article IX.B. Since Article IX.B refers only to a delay, plaintiff argues, it was not intended to cover the distinct concept of a failure to perform which is alleged in Count I. However, while Article IX.A, quoted above, uses the terms "failure to perform" and "delay," it does not "distinguish" between them. Rather, the terms are used interchangeably and a straightforward reading of the clause conveys the common-sense notion that a "failure to per-

Yankee's breach claim into a claim arising under the contract if an adjustment is available under the clause which affords Yankee complete relief.

Defendant contends that since DOE's alleged postponement of its disposal obligations under Article II is cognizable as an avoidable delay under Article IX.B, it cannot give rise to a separate breach claim which would entitle Yankee to common law damages. Therefore, defendant argues, the determination of whether Article IX.B affords Yankee complete relief for its nonexistent breach claim is "nothing more than a meaningless exercise." Yankee is entitled solely to the remedy is agreed to in Article IX.B, defendant reasons, regardless of how limited it may be.

This contention must be rejected. The presence of a limited contractual remedy for a breach does not automatically bar a court action for additional relief unless the parties clearly agreed that the contractual remedy would be exclusive. For instance, it has consistently been held in delay cases that "when only partial relief is available under the contract—*e.g.*, an extension of time . . . —the remedies under the contract are not exclusive and the contractor may secure damages in breach of contract if the Government's conduct has been unreasonable." *Utah Constr.*, 384 U.S. at 402 (citing *Kehm Corp. v. United States*, 119 Ct. Cl. 454, 93 F. Supp. 620 (1950), and *George A. Fuller Co. v. United States*, 108 Ct. Cl. 70, 69 F. Supp. 409 (1947)).[4]

---

form" can include a "delay," which can also be described as a failure to perform on time, a failure to perform in accordance with the schedule, etc.

[4] A contractor is required to prove that the government's conduct has been "unreasonable" when it alleges a breach of either the implied duty not to hinder or unreasonably delay performance or the implied duty of good faith and fair dealing. *See Kehm Corp.*, 119 Ct. Cl. at 469, 93 F. Supp. at 623; *George A. Fuller Co.*, 108 Ct. Cl. at 94-96, 69 F. Supp. at 411-12; *Koppers/Clough v. United States*, 201 Ct. Cl. 344, 361-63 (1973); *Commerce Int'l Co., Inc. v. United States*, 167 Ct. Cl. 529, 535-36, 338 F.2d 81, 85-86 (1964). In contrast, where a breach of an express, unconditional obligation

Similarly, in *Koppers/Clough v. United States*, 201 Ct. Cl. 344 (1973), the contract indicated that a pier would be available for the contractor's use and the government implicitly promised not to prevent its timely availability. The pier was not ready until well after contract performance began and the contractor sought to recover, under the contract and in court, the costs incurred as a result of the delay. The applicable clause stated that, in the event of a delay, "the Government shall only be liable to make an equitable adjustment under [the Changes clause] for changes in the property furnished." *Id.* at 350 n.4. Since no changes had been made to the pier, both the board and the court held that the clause afforded the contractor no relief. However, the court found that the contractor retained a claim for breach damages beyond the limited remedy available under the clause because it did not

> stipulate that the administrative provisions for adjustment are exclusive or that the Government shall not be liable for suit for breach of contract . . . . The language at the end of the provision limits only the Government's liability "to make an equitable adjustment", nothing more. It is not the sweeping exculpation present in other cases. Although the parties may have provided merely a restricted, not a comprehensive, remedy 'under the contract', the Government's

---

to perform by a certain date is alleged, the contractor need only prove that the promise has not been fulfilled by the date specified. *See Specialty Assembling & Packing Co., Inc. v. United Sttaes*, 174 Ct. Cl. 153, 156-62, 355 F.2d 554, 558-60 (1966) (where government promised to deliver materials by specific date, failure to do so is breach despite unforseen difficulties which hindered performance); *National Steel & Shipbuilding Co. v. United States*, 190 Ct. Cl. 247, 258-59, 419 F.2d 863, 870 (1969) (where contract contains unqualified promise to deliver material by specific date, "[t]he failure to deliver on time, without more, is a breach"); *Abbett Elec. Corp. v. United States*, 142 Ct. Cl. 609, 614-16, 162 F. Supp. 772, 775-76 (1958); *Torres v. United States*, 126 Ct. Cl. 76, 78, 112 F. Supp. 363, 364-65 (1953).

> substantive obligation remains intact and can be enforced by the courts.

201 Ct. Cl. at 356 (internal citations omitted); *see also Cedar Lumber, Inc. v. United States*, 5 Cl. Ct. 539, 552 (1984) ("When the government intends to disclaim liability for breach of contract, it must employ clear and express language to effectuate its intent.").[5]

Article IX.B does not purport to be an exclusive remedy, nor does it contain any language limiting either party's liability for avoidable delays which constitute a breach of the contract. This omission stands in stark contrast to Article IX.A, where the parties expresly agreed that, in the event of an unavoidable delay, "[n]either the Government nor the Purchaser shall be liable under this contract for damages." 10 C.F.R. § 961.11, Art. IX.A. Since the parties chose not to include such language in Article IX.B, Yankee retains a valid breach claim redressable in court if Article IX.B offers only limited relief.

This conclusion is further mandated by Article XI, "Remedies," which provides that "[n]othing in this contract shall be construed to preclude either party from asserting its rights and remedies under the contract *or at law*." 10 C.F.R. § 961.11, Art. XI (emphasis added). Similar language in the standard default clause has been held to preserve the government's right to pursue common law breach damages if the contractual remedies for default are unavailable or incomplete. *Rumley v. United*

---

[5] This is consistent with the prevailing rule applied to contracts between private parties. For instance, Section 2-719 of the Uniform Commercial Code provides that contracting parties may agree to limit the remedies available in the event of a breach, but resort to those remedies is optional "unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy." UCC § 2-719(1)(b). This section "creates a presumption that clauses prescribing remedies are cumulative rather than exclusive. If the parties intend the term to describe the sole remedy under the contract, this must be clearly expressed." *Id.* cmt. 2; *see also* 17A Am. Jur. 2d *Contracts* § 748 (1991).

States, 152 Ct. Cl. 166, 285 F.2d 773 (1961); *Marley v. United States*, 191 Ct. Cl. 205, 223-24, 423 F.2d 324, 334-35 (1970); *Astro-Space Labs., Inc. v. United States*, 200 Ct. Cl. 282, 311-12, 470 F.2d 1003, 1019-20 (1972).

For instance, in *Rumley*, the default article entitled the government to recover excess reprocurement costs from the defaulted contractor but also stated that "[t]he rights and remedies of the Government provided in this clause shall not be exclusive and are in addiiton to any other rights and remedies provided by law or under the contract." 152 Ct. Cl. at 171, 285 F.2d at 777. After the board held that relief was unavailable under the contract because the government had not awarded new contracts within a reasonable time after notice of termination, the government sought to recover breach damages in court. The court held that the language of the default article quoted above "reserved to the [government] any common law remedies which it may have had, at the same time recognizing the right to assert claims for excess cost under [the default clause]." *Id.* The court stated that the government "should be given the opportunity to show, as a matter of common law contract damages, how much the cost of obtaining performance was increased as a result of the plaintiff's breach." *Id.* at 172, 285 F.2d at 777; *see also Tester Corp. v. United States*, 1 Cl. Ct. 370, 376 (1982) (interpreting similar default clause, court held that even if the government recovers excess costs under the contract following a default termination, "it would not be precluded from seeking in a judicial action additional costs it incurred as a result of plaintiff's breach").

Admittedly, the language in the default clause at issue in *Rumley* is not identical to the language in Article XI of the Standard Contract. However, since Article IX.B does not purport to be an exclusive remedy, and since the parties specifically agreed in Article XI that nothing in the contract would preclude them from asserting their rights and remedies at law, the effect is the same. If it is

shown that DOE's delay breached the contract, and Article IX.B does not afford Yankee complete relief, Article XI preserves Yankee's right to pursue remedies at law which are unavailable under the contract. Accordingly, Article IX.B will wholly subsume Yankee's cause of action and convert its breach claim into a claim arising under the cointract only if complete relief is available under the clause.

In the event of an avoidable delay by DOE, Article IX.B entitles a purchaser to an equitable adjustment to the contract charges "to reflect *any* estimated additional costs incurred." 10 C.F.R. § 961.11, Art. IX.B (emphasis added).[6] Without a doubt, this broad language would encompass all of the SNF storage costs Yankee seeks in Count I as a result of DOE's alleged delay. As stated above, "any" is a broad term which means "some, no matter how much or how little, how many, or what kind." *Webster's New World Dictionary, supra,* at 62. Therefore, when an adequate adjustment to the contract charges is available under Article IX.B, it may indeed provide a purchaser with complete relief for DOE's alleged breach.

In this case, however, an adjustment to the contract charges is unavailable. Article VIII of the Standard Contract provides that the one-time fee for SNF used to generate electricity prior to April 7, 1983 "shall not be subject to adjustment." 10 C.F.R. § 961.11, Art. VIII ¶ 2. The clause also states that "[a]ny adjustment" to the post-April 7, 1983 fees "shall be prospective." *Id.* ¶ 4. Thus, the contract permits only a prospective adjustment to the post-April 7, 1983 fees. Since Yankee has already paid all of these fees (in addition to its entire pre-April 7, 1983 fee), no adjustment is available under the contract.

---

[6] Article IX.B also provides for an adjustment to the contract schedule. However, since DOE does not anticipate commencing disposal services until the year 2010, there is presently no schedule to adjust.

Furthermore, statutory restrictions on the use of contract payments preclude DOE from retroactively adjusting Yankee's charges to reflect its on-site storage costs. Under Section 302(c) of the NWPA, DOE was required to immediately deposit Yankee's fee payments into the Waste Fund. 42 U.S.C. § 10222(c). DOE's authority to make expenditures from the Waste Fund is restricted to specific listed activities. 42 U.S.C. § 10222(d). As the agency itself recognized in its May 3, 1995 Final Interpretation, the list does not include "[p]aying for the costs of on-site storage." 60 Fed. Reg. at 21,797. Therefore, the Act "does not provide for use of the Nuclear Waste Fund to help utilities defray costs of on-site storage." *Id.*[7]

---

[7] DOE has not retreated from its Final Interpretation in this regard. Nor did it offer, in response to a request from the court, any explanation of how Yankee's fully-paid charges could be adjusted in light of the contract and statutory provisions discussed above. Instead, the agency states that this issue must be decided by the CO in response to a certified claim. However, the court can and must decide the legal issue of whether an adjustment is available under the contract in order to rule on defendant's motion. *See Edward R. Marden Corp.*, 194 Ct. Cl. at 804-05, 442 F.2d at 366-67; *Blake Constr. Co.*, 220 Ct. Cl. at 59, 597 F.2d at 1358.

Despite the agency's refusal to comment, counsel for defendant did offer his personal speculation that DOE perhaps could pay for contract adjustments from sources other than the Waste Fund, "if available." For instance, counsel pointed out that DOE could decide to seek an appropriation from Congress for this purpose. However, defendant, as the moving party, "has the burden of proving that no claim has been stated." 2 James Wm. Moore, *Moore's Federal Practice* § 12.34 at 12-56 (3d ed. 1998). Counsel's personal speculation, not necessarily reflecting the agency's position, about theoretical funding sources which have not been identified and potential future appropriations which have been not sought does not discharge this burden. More importantly, Article IX.B provides only for an adjustment to the contract "charges." Yankee has paid all the charges, and DOE's conclusion that it cannot refund them to defray Yanke's on-site storage costs is in accord with the statutory language. Since no adjustment to the contract charges can be made, no relief is available *under the contract.* Whether relief could be provided by some extra-contractual means is im-

Since no adjustment to the contract charges is available in these circumstances, Yankee's breach claim is not redressable, either in whole or in part, under Article IX.B. As a result, the clause does not convert Yankee's breach claim into a claim "arising under" the contract and subject to the disputes clause. Count I alleges a pure breach claim for which relief may be granted by this court. 28 U.S.C. § 1491(a)(1). Defendant's motion to dismiss Count I is therefore denied.

C. Plaintiff's Motion for Partial Summary Judgment Under Count I

Summary judgment is appropriate when there are no genuine issues of material fact and the movant is entitled to prevail as a matter of law. RCFC 56(c); *Mingus Constructors, Inc. v. United States,* 812 F.2d 1387, 1390 (Fed. Cir. 1987). The movant "bears the burden of demonstrating the absence of genuine issues of material fact." *Conroy v. Reebok Int'l, Ltd.,* 14 F.3d 1570, 1575 (Fed. Cir. 1994).

Plaintiff asserts that it is entitled to summary judgment on the issue of liability under Count I because DOE has, as a matter of law, breached its express, unconditional obligation in Article II to begin disposing of Yankee's SNF by January 31, 1998. Defendant responds that since DOE's failure to begin disposal services on time is cognizable as a delay under Article IX.B, it cannot be a breach. Defendant also contends that issues of fact as to whether DOE commenced contract services by January 31, 1998 preclude the entry of judgment in plaintiff's favor. Defendant relies on the declaration of Mr. Lake H. Barrett, DOE's Acting Director of the Office of Civilian Radioactive Waste Management, who attests that DOE has expended significant efforts developing a site suitable

---

material to defendant's motion because it is a matter beyond the scope of the disputes clause.

for an SNF repository. Mr. Barrett also states that DOE has discussed its delay with contract holders and the public and has issued an annual acceptance priority ranking for receipt of SNF.

In the *Indiana Michigan* decision, which DOE did not appeal, it was held that Section 302(a)(5)(B) of the NWPA "mandates that DOE assume a contractual obligation to start disposing of the SNF by January 31, 1998." *Northern States,* 128 F.3d at 757 (summarizing holding in *Indiana Michigan*). Aside from the utilities' payment of fees, DOE's obligation was held to be "without qualification or condition." *Indiana Michigan,* 88 F.3d at 1276.

Article II of the Standard Contract implements Section 302(a)(5)(B). It lists the essential contract services DOE is to provide, *i.e.*, acceptance, transportation, and disposal of SNF, and states that these services "shall begin" not later than January 31, 1998. 10 C.F.R. § 961.11, Art. II. DOE has not offered any vaild argument demonstrating that the duties created by Article II differ in any way from those required by Section 302(a)(5)(B). It is therefore concluded that Article II, when construed in accordance with the statutory mandate it is intended to implement, imposed a duty on DOE, conditioned only on Yankee's payment of fees, to begin accepting, transporting, and disposing of Yankee's SNF by January 31, 1998.

"Failure to perform a contractual duty when it is due is a breach of the contract." *Winstar Corp. v. United States,* 64 F.3d 1531, 1545 (Fed. Cir. 1995), *aff'd,* 518 U.S. 839 (1996); *see supra* n.4. It is undisputed that Yankee has paid all the contract fees and, notwithstanding Mr. Barrett's declaration, it is also undisputed that DOE has not begun accepting, transporting, and disposing of Yankee's SNF. Accordingly, DOE has breached the contract.

Defendant argues that since DOE's nonperformance is cognizable as an avoidable delay under Article IX.B it cannot be a breach. As stated above, if an adjustment is available under Article IX.B, it certainly may convert a purchaser's breach *claim* into a claim arising under the contract. But neither Article IX.B nor any other clause gave DOE the right to unilaterally postpone its unconditional obligations under Article II.[8] Therefore, DOE's failure to begin disposal services by January 31, 1998 remains an unauthorized breach of Article II even though it is cognizable as an avoidable delay and may, in some cases, be redressable under Article IX.B. *See George A. Fuller Co.*, 108 Ct. Cl. at 101, 69 F. Supp. at 415 (government "is liable for any delay except one caused *by the exercise of a reserved right* or one brought about by an act of God, of the law, or the other party") (emphasis added).[9]

Accordingly, there are no genuine issues of material fact. Plaintiff is entitled to judgment, as a matter of law, on the issue of liability under Court I. Therefore, plain-

---

[8] In Article X, "Suspension," DOE did reserve the right to "suspend this contract or any portion thereof" if Yankee failed to perform and to "suspend any scheduled deliveries in the event that a national emergency requires that priority be given to Government programs to the exclusion of the work under this contract." 10 C.F.R. § 961.11, Art. X. However, defendant does not argue, and the record does not reflect, that either condition applies here. In addition, while Article XV, "Amendments," does permit changes to the contract terms, both parties must agree to the changes. 10 C.F.R. § 961.11, Art. XV.

[9] *See also Chaney and James Constr. Co.*, 190 Ct. Cl. at 706, 421 F.2d at 732 ("In the absence of a contract clause giving the Government the right to suspend the contractor's work or otherwise delay the contractor's performance, a work stoppage caused by the Government would ordinarily be a breach of contract giving rise to an action at law for damages, but a suspension of work caused by the Government is not a breach of contract when done pursuant to a right granted to the Government by the terms of the contract itself.") (citation omitted).

tiff's cross-motion for partial summary judgment is granted.

d. Defendant's Motion to Dismiss Count II

Every contract implicitly obligates each party to perform its duties reasonably and in good faith. *See Asco-Falcon II Shipping Co. v. United States*, 18 Cl. Ct. 484, 491-92 (1989). In Count II, Yankee asserts that DOE breached this obligation by willfully and deliberately refusing to take Yankee's SNF despite its ability to do so, unreasonably failing to take steps to ensure that performance would begin by January 31, 1998, and otherwise unreasonably failing to perform its duties under the contract. Defendant has moved to dismiss Count II on the ground that it alleges an avoidable delay contemplated by and redressable under Article IX.B and Article XVI.

Neither Article IX.B nor any other contract clause purports to cover or redress a breach of the implied duty of good faith and fair dealing. As a result, Count II does not arise under the contract and is not subject to administrative resolution under the disputes clause. *See Gregory Lumber*, 9 Cl. Ct. at 520 (claims based on breach of implied duty cognizable only as breach claims because "in no clause of plaintiff's five contracts is any attempt made to define a remedy for the failure of a party to have acted in good faith."). Defendant's motion to dismiss Count II is denied.

e. Defendant's Motion to Dismiss Count III

In Count III, Yankee asserts that DOE's failure to dispose of its SNF amounts to a taking of the real property on which its inoperative facility is located. Yankee seeks just compensation for the alleged taking under the Fifth Amendment to the U.S. Constitution. Defendant argues that Count III must be dismissed because Yankee has not processed its claim through the administrative procedures in the disputes clause. However, no contract clause purports to cover or redress an alleged taking of real prop-

erty. Therefore, plaintiff's taking claim is not converted into a claim arising under the contract and subject to the disputes clause. Defendant's motion to dismiss Count III is denied.

f. Defendant's Motion to Dismiss Count IV

In Count IV, Yankee aserts that DOE's failure to begin disposing of Yankee's SNF by January 31, 1998 violates the NWPA and effects an illegal exaction of SNF storage costs from Yankee. Defendant contends that Count IV must be dismissed because Yankee has failed to seek a remedy under the contract and has yet to be denied just compensation for the asserted illegal exaction. Defendant also contends that, to the extent Yankee is seeking to recover its contract payments, those payments were not illegally exacted because they were paid pursuant to the terms of the contract.

"Illegal exaction jurisdiction will lie in cases where a 'plaintiff has paid money over to the Government, directly or in effect, and seeks return of all or part of that sum' that 'was improperly paid, exacted, or taken from the claimant in contravention of the Constitution, a statute, or a regulation.' " *Bowman v. United States,* 35 Fed. Cl. 397, 400 (1996) (quoting *Eastport S.S. Corp. v. United States,* 178 Ct. Cl. 599, 605, 372 F.2d 1002, 1007-08 (1967)). "If [plaintiff] made payments that by law the [government] was obligated to make, the government has 'in its pocket' money corresponding to the payments that were the government's statutory obligation. Suit can be maintained under the Tucker Act for recovery of the money illegally required to be paid on behalf of the government." *Aerolineas Argentinas v. United States,* 77 F.3d 1564, 1573-74 (Fed. Cir. 1996).

Yankee's illegal exaction claim fails because the duty on which the claim is based is contractual, not statutory. Section 302(a)(5)(B) of the NWPA directed DOE assume a *contractual* obligation to begin disposing of SNF

by January 31, 1998. 42 U.S.C. § 10222(a)(5). As discussed above, DOE has done so through Article II of the Standard Contract. Therefore, while DOE's failure to begin disposing of Yankee's SNF breaches Article II, it does not violate any statutory duty. Thus, Yankee's post-1998 storage costs cannot be recovered on an illegal exaction theory. Defendant's motion to dismis Count IV is granted.

CONCLUSION

Based on the foregoing, it is hereby ORDERED:

(1) Defendant's June 4, 1998 Motion to Dismiss Pursuant to RCFC 12(b)(4) is GRANTED to the extent it seeks dismissal of Count IV of the complaint. Defendant's motion is otherwise DENIED. When final judgment is entered by the Clerk in this matter, it shall reflect the dismissal of Count IV;

(2) Plaintiff's July 2, 1998 Cros-Motion for Summary Judgment on Contract Liability is GRANTED; and

(3) A Pretrial Order will be entered shortly scheduling further proceedings in this matter.

/s/ James F. Merow
JAMES F. MEROW
Senior Judge

Supreme Court, U.S.
FILED
NOV 23 1998
CLERK

No. 98-384

In the Supreme Court of the United States

OCTOBER TERM, 1998

UNITED STATES DEPARTMENT OF ENERGY, ET AL.,
PETITIONERS

v.

NORTHERN STATES POWER COMPANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

SETH P. WAXMAN
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

TABLE OF AUTHORITIES

Cases:	Page
Bowen v. *Massachusetts*, 487 U.S. 879 (1988)	3
Chicot County Drainage Dist. v. *Baxter State Bank*, 308 U.S. 371 (1940)	7
Indiana Michigan Power Co. v. *Department of Energy*, 88 F.3d 1272 (D.C. Cir. 1996)	4
Megapulse, Inc. v. *Lewis*, 672 F.2d 959 (D.C. Cir. 1982)	8
North Star Alaska v. *United States*, 9 F.3d 1430 (9th Cir. 1993)	3
North Star Alaska v. *United States*, 14 F.3d 36 (9th Cir.), cert. denied, 512 U.S. 1220 (1994)	8
Sharp v. *Weinberger*, 798 F.2d 1521 (D.C. Cir. 1986)	3
Spectrum Leasing Corp. v. *United States*, 764 F.2d 891 (D.C. Cir. 1985)	8
Transohio Savings Bank v. *Director, Office of Thrift Supervision*, 967 F.2d 598 (D.C. Cir. 1992)	3-4
United States v. *United States Fidelity & Guar. Co.*, 309 U.S. 506 (1940)	7
United States v. *Utah Constr. & Mining Co.*, 384 U.S. 394 (1966)	8
Yankee Atomic Electric Co. v. *United States*, No. 98-126C (Fed. Cl. Oct. 29, 1998)	4
Statutes and regulation:	
Administrative Procedure Act, 5 U.S.C. 701 *et seq.*	2
5 U.S.C. 702	3, 7
5 U.S.C. 702(2)	3
5 U.S.C. 704	7
All Writs Act, 28 U.S.C. 1651(a)	4
Nuclear Waste Policy Act of 1982, 42 U.S.C. 10101 *et seq.*	1
42 U.S.C. 10134(a)	6
42 U.S.C. 10139	3, 10
42 U.S.C. 10139(c)	3

Statutes and regulation—Continued: Page

42 U.S.C. 10165(b) 6
42 U.S.C. 10168(d) 6
42 U.S.C. 10222(a)(5) 2
Tucker Act, 28 U.S.C. 1491 7
10 C.F.R. 961.11:
Art. II 2
Art. IX 4
Art. IX.A 5, 6
Art. IX.B 5

Miscellaneous:

3 Restatement (Second) of the Law : Contracts 2d (1981) 8

In the Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-384

UNITED STATES DEPARTMENT OF ENERGY, ET AL.,
PETITIONERS

v.

NORTHERN STATES POWER COMPANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

As the petition for a writ of certiorari explains, the decision of the court of appeals has substantially disrupted the legislative design for resolving disputes concerning disposal of spent nuclear fuel under the Nuclear Waste Policy Act of 1982 (NWPA), 42 U.S.C. 10101 *et seq.* Notwithstanding the court of appeals' acknowledged lack of authority to adjudicate contract claims against the United States, the court has issued a writ of mandamus directing the Department of Energy (DOE) in its implementation of the Standard Contract for Disposal of Spent Nuclear Fuel and/or High Level Radioactive Waste (Standard Contract). That decision significantly undermines the jurisdiction of the Court of Federal Claims in a controversy of national significance and with potentially significant monetary impact for the parties. The court's imposition of that relief raises a substantial issue involving the interaction of the Tucker

Act, the NWPA, and the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*

1. Both the state and utility respondents assert that their claims arise under the NWPA itself rather than under the Standard Contract. See Util. Br. 8, 10, 18; States Br. 10, 12, 16, 20. Indeed, the state respondents suggest (Br. 16) that the "plain language" of the Act supports their claims. Neither group of respondents, however, quotes the statutory provision that DOE is alleged to have violated. That reticence is understandable. The pertinent NWPA provision does not direct DOE to accept spent nuclear fuel (SNF) by January 31, 1998; rather, it states that "[c]ontracts entered into under [the Act] shall provide" for commencement of disposal by that date. 42 U.S.C. 10222(a)(5).

Consistent with that statutory requirement, Article II of the Standard Contract provides that "[t]he services to be provided by DOE under this contract shall begin, after commencement of facility operations, not later than January 31, 1998." 10 C.F.R. 961.11. Because the NWPA requires only that contracts between DOE and utilities must incorporate the January 31, 1998, deadline, and because Article II of the Standard Contract satisfies that requirement, respondents cannot demonstrate the existence of a statutory violation. Rather, any breach that DOE may have committed by failing to commence disposal of SNF is a breach of the contract only. Indeed, the court of appeals ultimately recognized that "[w]hile the statute requires the DOE to include an unconditional obligation in the Standard Contract, it does not itself require performance.

Breach by the DOE does not violate a statutory duty." Pet. App. 18a.[1]

Because DOE's obligation to accept SNF for disposal arises only under the contract, the judicial review provision of the NWPA (42 U.S.C. 10139) is inapplicable here. Moreover, the only potentially applicable waiver of sovereign immunity, 5 U.S.C. 702, does not apply because (1) the Tucker Act impliedly forbids any relief on a contract with the United States other than money damages, and (2) damages relief is explicitly excluded from the APA's waiver of sovereign immunity. See *Sharp* v. *Weinberger*, 798 F.2d 1521, 1523-1524 (D.C. Cir. 1986). See also *Bowen* v. *Massachusetts*, 487 U.S. 879, 910 n.48 (1988). Contrary to respondents' argument (Util. Br. 15-17), this Court's decision in *Bowen* does not support their claim. As the courts of appeals have recognized, *Bowen* did not involve a contract with the United States and does not address the application of 5 U.S.C. 702(2) in that context. See *North Star Alaska* v. *United States*, 9 F.3d 1430, 1432 (9th Cir. 1993) (en banc); *Transohio Savings Bank* v. *Director*,

---

[1] As the petition explains (at 23-24), the 180-day limitations period established by 42 U.S.C. 10139(c) would have barred respondents from asserting that the terms of the Standard Contract are inconsistent with the NWPA. The utility respondents take issue with that proposition, stating (Br. 12) that "a party aggrieved by the application of an agency rule may challenge that application even though the statutory time limit for judicial review of the promulgation of the rule has passed." Our point, however, is not that the utilities are foreclosed from challenging DOE's implementation of the Standard Contract—only that they must pursue such challenges in the forum designated by Congress for contract suits against the government. The cases cited by respondents are inapposite, since none of them involved the administration of a contract with the United States.

Office of Thrift Supervision, 967 F.2d 598, 613 (D.C. Cir. 1992).

2. Both the *state and utility respondents* contend (Util. Br. 8-9; States Br. 18-19) that the judgment below was authorized by the All Writs Act, 28 U.S.C. 1651(a), as a permissible means of enforcing the court of appeals' mandate in *Indiana Michigan Power Co.* v. *Department of Energy*, 88 F.3d 1272 (D.C. Cir. 1996). As our petition explains (at 18-19 & n.10), however, the court of appeals' authority to enforce its mandate does not extend to reviewing and invalidating the preliminary stages of a contract remedial process, the results of which could only be reviewed in another court. Nor does a court's power extend to determining in advance the preclusive effect of its prior judgment in actions filed in another tribunal.

Respondents' characterization of the court of appeals' ruling also ignores the highly intrusive nature of the mandamus relief awarded in this case. The court interjected itself in the dispute resolution process created by the contract, and it summarily reviewed and rejected DOE's preliminary determination that its delay in performance was "[u]navoidable" within the meaning of Article IX. The court's decision substantially interferes both with DOE's own processes of contract administration and with the orderly adjudication by the Court of Federal Claims of suits arising under the Standard Contract.[2]

---

[2] In *Yankee Atomic Electric Co.* v. *United States*, No. 98-126C (Oct. 29, 1998), the Court of Federal Claims rejected the government's motion to dismiss the plaintiff's suit for failure to pursue an equitable adjustment, the remedy specified by the Standard Contract for an avoidable delay in contract performance. See Util. Resp. Supp. Br. SA-8 to SA-36. The court concluded that the equitable adjustment remedy was not exclusive with respect to

Finally, the decision in the instant case cannot properly be regarded as a means of enforcing the *Indiana Michigan* mandate because (contrary to the ruling of the court below) there is no logical contradiction between the earlier holding that DOE's obligation to accept SNF is "unconditional" and DOE's determination that its delay in fulfilling that obligation is unavoidable. As the petition explains (at 20), the "[u]navoidable delays" provision of the Standard Contract presupposes a failure of performance by one of the contracting parties. Respondents may regard the remedy set forth in that provision to be inadequate. It is, however, the remedy

---

the plaintiff in that case and did not preclude a damages claim for breach of contract. *Id.* at SA-25.

The utility respondents suggest (Supp. Br. 2-3) that the Court of Federal Claims' decision in *Yankee Atomic* was based on that court's own independent analysis of the court of appeals' decision in *Indiana Michigan*. In fact, the court of appeals' mandamus order in the instant case substantially influenced the course of proceedings in the Court of Federal Claims. As the Court of Federal Claims noted, DOE has construed the mandamus order to "prohibit[] [DOE] from arguing that its failure to begin SNF disposal services is an unavoidable, non-compensable delay under Article IX.A of the Standard Contract." Util. Resp. Supp. Br. SA-18. The Court of Federal Claims accordingly limited its preclusion analysis to the question whether Article IX.B of the Standard Contract furnishes the exclusive remedy for *avoidable* delays. See Util. Resp. Supp. Br. SA-23 to SA-31. In concluding that the Article IX.B remedy was not exclusive, the court specifically contrasted the language of Article IX.B with that of Article IX.A, and strongly suggested that the latter provision *would* furnish the exclusive remedy for an unavoidable delay. *Id.* at SA-27. In short, the court of appeals' directive that DOE treat its delay in performance as avoidable has directly and substantially affected the Court of Federal Claims' resolution of the question whether utilities may seek a remedy (*i.e.*, damages) other than those provided by the Standard Contract.

the contracting parties agreed to with respect to delays in performance that result from "circumstances beyond the reasonable control of the Purchaser or DOE." 10 C.F.R. 961.11 (Art. IX.A).[3] In any event, respondents' dissatisfaction cannot justify the court of appeals' extraordinary holding that the very catalyst that can first bring the contract's remedial provisions into play—the finding of a failure of performance—automatically eliminates one of those provisions from consideration in proceedings to interpret and apply those provisions (proceedings committed to the exclusive jurisdiction of the Court of Federal Claims).

For essentially the same reasons, there is no merit to the utility respondents' contention (see Br. 12-13) that DOE's failure to seek further review of the judgment in *Indiana Michigan* bars the agency, under the doctrine of *res judicata*, from raising any jurisdictional objection

---

[3] Respondents repeatedly insinuate (States Br. 9 n.6, 22; Util. Br. 5 n.1) that DOE is capable of accepting SNF for disposal but has simply refused to do so. As the petition explains (at 10 n.5, 22), however, DOE's preliminary determination that the delay in performance was unavoidable was supported by an extensive account of the legal and practical obstacles to the development of a suitable repository. Respondents emphasize (States Br. 9 n.6; Util. Br. 5) that DOE is physically capable of accepting SNF at the present time. However, with respect to the spent fuel at issue in this case—*i.e.*, SNF covered by contracts under the NWPA—DOE's authority to begin disposal services is circumscribed by the specific limitations of the Act. Under 42 U.S.C. 10165(b) and 10168(d), DOE may not proceed with an interim storage program for a specific site until after a site for a repository is recommended to the President in accordance with 42 U.S.C. 10134(a), and it may not begin construction of such a facility until the Nuclear Regulatory Commission has issued a license for a repository. See Br. in Opp. at 16 n.6, *State of Michigan, et al.* v. *United States Department of Energy, et al.*, petition for cert. pending, No. 98-225.

to the relief awarded by the court of appeals in the present case. The court in *Indiana Michigan* did not purport to resolve any question concerning the application of the Standard Contract's remedial provisions. The parties therefore had no opportunity to litigate the propriety of a judicial order setting aside DOE's preliminary determination under the Delays Clause.[4] In *Indiana Michigan*, the court reviewed and set aside DOE's published interpretation of a provision of the NWPA. During the pendency of *Indiana Michigan*, no contract claims had been presented to either DOE or the Court of Federal Claims. The court of appeals limited its relief to a remand for proceedings consistent with the opinion. There was no opportunity to litigate the jurisdiction of the court of appeals to review and pretermit contract proceedings, since the court had not suggested that such relief could be appropriate.[5]

3. Respondents argue (Util. Br. 8; States Br. 10) that the court was authorized to entertain their petitions for review because those petitions did not present contract claims or request money damages. The courts of

---

[4] Indeed, the state respondents observe (Br. 17) that "[t]he 'avoidable' or 'unavoidable' issues did not really exist until the DOE itself placed it at issue in response to the court of appeals' remand."

[5] Even if *res judicata* would otherwise be applicable, that doctrine cannot bar relitigation of an underlying jurisdictional issue "where the issue is the waiver of immunity." *United States* v. *United States Fidelity & Guar. Co.*, 309 U.S. 506, 514 (1940) (distinguishing *Chicot County Drainage Dist.* v. *Baxter State Bank*, 308 U.S. 371 (1940)). Here, the issue is whether the relief granted by the court of appeals came within the waiver of sovereign immunity found in the APA, 5 U.S.C. 702, 704, or is governed exclusively by the waiver found in the Tucker Act, 28 U.S.C. 1491. *Res judicata* presents no barrier to the consideration of that issue.

appeals have recognized, however, that the Tucker Act's preclusive effect on the jurisdiction of another court turns "both on the source of the rights upon which the plaintiff bases its claims, and upon the type of relief sought (*or appropriate*)." *Megapulse, Inc.* v. *Lewis*, 672 F.2d 959, 968 (D.C. Cir. 1982) (emphasis added). Accord *North Star Alaska* v. *United States*, 14 F.3d 36, 37 (9th Cir.), cert. denied, 512 U.S. 1220 (1994); *Spectrum Leasing Corp.* v. *United States*, 764 F.2d 891, 893 (D.C. Cir. 1985). In light of the fact that the obligation to begin disposal services by January 31, 1998, is grounded in the Standard Contract, the respondents' request for an order requiring compliance with the deadline was in substance a request for specific performance, whether or not respondents framed their claims in that manner. And the request for permission to escrow fee payments was in essence a prayer for a declaration that the utilities could suspend performance of their reciprocal obligations under the contract. See 3 Restatement (Second) of the Law: Contracts 2d § 345 cmts. a-d (1981).

In any event, the relief actually awarded by the court of appeals set aside a determination by the agency administering the contract, DOE, as to the effect and application of a particular provision of the contract, the Delays Clause. Such relief goes directly to contract implementation and has long been available to government contractors through actions founded on the contract under the Tucker Act. See *United States* v. *Utah Constr. & Mining Co.*, 384 U.S. 394 (1966). Had the respondents requested the relief ultimately granted by the court below, the question whether the Tucker Act precluded the court of appeals from granting such relief would necessarily have arisen. If (as we contend) the court of appeals would have lacked jurisdiction to entertain such a claim, the relief the court granted can-

not possibly become appropriate by virtue of the fact that respondents requested a somewhat different remedy. Both the court of appeals and the Court of Federal Claims are courts of limited jurisdiction, and they can exercise no power beyond that vested in them by Congress.

4. The utility respondents argue (Br. 19-21) that review of the jurisdictional issue would be premature in light of other pending litigation. But their suggestion (Br. 19) that the Court of Federal Claims may hold the Delays Clause to be entirely inapplicable to this controversy is speculative. Indeed, that court granted the plaintiff in *Yankee Atomic* (see note 2, *supra*) partial summary judgment on liability without addressing that contention. Respondents also assert (Util. Br. 19-20) that the Court of Federal Claims might choose to apply *Indiana Michigan* in the same manner as did the court of appeals in the instant case, even if that court's mandamus order was not in effect. The manifest purpose and effect of the court of appeals' mandamus order, however, is to pretermit the administrative and judicial processes by which respondents' contract claims would otherwise be resolved. As we explain above (see note 2, *supra*), the court of appeals' mandamus order has already had a significant impact on pending damages actions in the Court of Federal Claims. The possibility that the Court of Federal Claims might have reached the same conclusion even in the absence of the court of appeals' mandamus order does not alter the disruptive effect of that order. It is no more than the usual possibility that exists when one court has improperly encroached upon the jurisdiction of another.

Finally, the utility respondents rely (Br. 20-21) on the pendency of new litigation in the court of appeals brought by five of the respondents. See *Consolidated*

Edison Company of New York, Inc. v. *United States Department of Energy*, No. 98-1358 (D.C. Cir.). In that case, five utilities which are also parties to the instant litigation have invoked Section 119 (the judicial review provision) of the NWPA, 42 U.S.C. 10139, and asserted claims for, *inter alia*, damages for breach of contract, specific performance, unconstitutional taking, and violations of due process. Contrary to respondents' contention (Util. Br. 20), the judgment under review does address the interaction of the Tucker Act and Section 119 of the NWPA. See Pet. App. 17a-19a. Moreover, far from suggesting that the petition in the instant case is premature, the utilities' ongoing efforts to pursue further claims in the court of appeals reinforces the need for this Court to declare the proper limits of that court's jurisdiction.

* * * * *

For the foregoing reasons and for those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

NOVEMBER 1998